Olinger

THE OLINGER MEMORIAL LIBRARY

Westminster Center, 1204 Oread
Lawrence, Kansas

In Memory of Dr. Stanton Olinger
University Pastor at University of Kansas
1911–1918
and
In honor of his wife, Mrs. Anna Olinger
Program Director at Westminster
1928–1941
Member of the University of Kansas
Westminster Committee
1946–

+

This Book, a Gift from

_____

_____

Date_____

Digitized by the Internet Archive
in 2024

https://archive.org/details/politicaltheorie0000unse_s6a0

THE POLITICAL THEORIES OF THE ANCIENT WORLD

JA8
.W5

THE POLITICAL THEORIES

OF THE ANCIENT WORLD

BY

WESTEL WOODBURY WILLOUGHBY, PH.D.

ASSOCIATE PROFESSOR OF POLITICAL SCIENCE IN THE JOHNS HOPKINS UNIVERSITY; AUTHOR OF "THE NATURE OF THE STATE," "SOCIAL JUSTICE," "THE RIGHTS AND DUTIES OF AMERICAN CITIZENSHIP," ETC.

KANSAS SCHOOL OF RELIGION
UNIVERSITY OF KANSAS
1300 OREAD AVENUE
LAWRENCE, KANSAS 66044

LONGMANS, GREEN, AND CO.
91 AND 93 FIFTH AVENUE, NEW YORK
LONDON AND BOMBAY
1903

COPYRIGHT, 1903, BY
LONGMANS, GREEN, AND CO.

All rights reserved.

Greece - politics and government
Rome - " " "

Norwood Press
J. S. Cushing & Co. — Berwick & Smith Co.
Norwood, Mass., U.S.A.

PREFACE

PHILOSOPHY is a search for the essentially true, and as such alone is able to satisfy the mind's demand for a knowledge of the whence, the how, and, to use a scholastic term, the "quiddity" of human phenomena. Apart therefore from any practical results to which its theories may lead, its study is enticing by giving play to our highest intellectual faculties. In the general field of philosophy political speculation has occupied an important place, attracting to its pursuit the greatest thinkers of all times. A study of the history of political theories thus not only brings one at once into touch with one of the most important subjects with which men's minds have been concerned since first was attempted the determination of the nature and end of human life, but, because of the special phenomena dealt with, renders possible, to a degree not to be attained through any other means, an insight into the logic and significance of political history. Political theories have ever been dependent upon, and have been evoked by, particular objective conditions. They therefore reflect the thoughts, and serve to interpret the actuating motives, at the root of important political movements. In the history of political theories the student is able to enter immediately into a knowledge of what men in the past have really striven for, what have been their ideals. Who, for instance, could hope to understand the Puritan movement, either in England or in our own country, without a knowledge of its political theories; or expect to appreciate the history of the middle and early modern ages without a comprehension of the various views regarding the relation between church and state promulgated by mediæval writers? How are we to explain the long-continued and widespread acceptance of the doctrine of the divine right of kings, which to-day seems so essentially absurd, without knowing what that theory really meant to its

believers, and what were its relations to such other antagonistic theories as those of papal supremacy and popular sovereignty?

Not only have political speculations been largely influenced by practical contemporaneous problems, but they have been, to an almost equal extent, though less directly, controlled by what has been called the "intellectual climate" of their times. This is a point which Lecky has strongly emphasised and has amply sustained by facts and reasoning. Beliefs which at one time have had almost universal currency are at another declared absurd, the reason for the change being, not so much that specific evidence or exact logic has overthrown the old ideas, as that the intellectual trend of the later time has been toward a scepticism as regards the particular class of facts involved. Witchcraft, for example, is now relegated by all enlightened minds to the limbo of superstition and fraud; yet, as Lecky says in the first chapter of his *History of Rationalism in Europe*, for more than fifteen hundred years it was universally believed that the Bible established, in the clearest manner, the reality of the crime, and that an amount of evidence, so varied and so ample as to preclude the very possibility of doubt, attested its continuance and its prevalence. The clergy denounced it with all the emphasis of authority. The legislators of almost every land enacted laws for its punishment. Acute judges, whose lives were spent in sifting evidence, investigated the question on countless occasions and condemned the accused.

All this occurred, not because humanity was wanting, not because ignorance was universal, not because of political or religious intolerance, but because acceptance of the miraculous was a characteristic of the thought of the age; and the belief in witchcraft died out only when, through the advance of science, the idea gradually gained ground that law holds sway throughout the physical world.

Exactly the same phenomenon is to be observed in trac-

ing the development of political theories. Dominant political systems lose support and are supplanted by others as the chief thought of the times changes from matters military to matters industrial, or from belief in the beneficence of authority to confidence in the inherent goodness of freedom. Arguments which at one time are deemed abundantly sufficient to sustain the divine right of kings, or the religious duty of absolute obedience, are at another spurned as not even worthy of examination; and we now wonder that men of the learning of Locke or Sidney should have considered it worth their while to expend so much effort in the refutation of Filmer's system. So, too, doctrines of papal supremacy, of religious persecution, and of natural rights have each had their summer of prosperity, only to be blasted as the general intellectual climate has assumed toward them a wintry aspect.

Finally, the history of political theories has the same value that the history of any subject possesses; namely, as a means of more fully understanding the conceptions and problems dealt with than is otherwise possible. The value of the historical method in all fields of investigation is now so well recognised that no statement of it is here needed. It is proper, however, to call attention to the fact that it is especially valuable in the treatment of so complicated a subject as that with which abstract political philosophy has to deal.

At the same time, however, that it is admitted that in any field of thought a knowledge of the theories that have been held in the past is the surest source when a true philosophy of one's own is to be obtained, it is also to be recognised that before one himself attempts the preparations of a history of such theories, he should first have formulated, in outline at least, what to himself would seem to be a valid philosophy of the subject with which he is to deal. The reason for this is sufficiently plain. Not until one has himself those ideas as to what is true or what is false, is he qualified adequately to describe or intelligently

to criticise the theories of others. Not until he already has distinctly in the mind the fundamental conceptions that are necessarily involved can he possibly comprehend the logical relations between different systems of thought, or fully appreciate the connections between the several principles of the same system of thought. To have a knowledge of these logical criteria and essential principles is to have a philosophy.

It is true that, in a certain sense, the possession of decided ideas as to what is true or false in regard to a subject that is to be examined renders the proper performance of the investigator's task more difficult, in that it makes it more likely that, consciously or unconsciously, he will strain the doctrines of others so as to bring out correspondences with his own views, or to disclose distinctions that either do not exist, or, if they do exist, are unimportant. But this is a tendency which, though one to be carefully guarded against, need not be yielded to. To one with a judicial and impartial mind this pressure may be almost wholly absent. But whether present or not, the evil is not one that may be escaped by voiding the mind of all definite ideas. As Zeller has said, in the introduction to his *History of Pre-Socratic Philosophy:* "Philosophical impartiality does not consist in the absence of all presuppositions, but in bringing to the study of past events presuppositions that are true. The man who is without any philosophical standpoint is not, on that account, without any standpoint whatever: he who has formed no scientific opinion on philosophical questions has an unscientific opinion about them. To say that we should bring to the history of philosophy no philosophy of our own really means that in dealing with it we should give the preference to unscientific as compared with scientific ideas."

What Zeller has thus so luminously set forth as to the qualifications requisite for the historian of philosophy in general applies with equal force to him who would trace

the course of political speculations. This preliminary qualification the author believes he has obtained. In the two works entitled, respectively, *The Nature of the State: A Study in Political Philosophy*, published in 1896, and *Social Justice: A Critical Essay*, published in 1900, there has been outlined what to the author appears to be a correct and fairly complete outline of political theory. That he may be more or less mistaken in this he of course recognises. But this does not alter the fact that, whether right or wrong, in stating his premises and in drawing from them their logical corollaries, he has necessarily been led to form definite ideas regarding the chief subjects of political speculations, — ideas which, in his own mind at least, are distinct and clear and so united by logical bonds as to form a philosophical whole.

Some explanation should be given as to the proposed scope and method of treatment of this work. This volume is the first of a number of volumes which the author hopes in time to prepare covering the entire history of political philosophy. His idea is to write a history of political ideas of the periods covered, not to prepare a digest of political literature. A dictionary of political writings would be of great value, but only as a work of reference, that is, as a source whence could readily be obtained the political views of writers whose works are in a foreign tongue, or so rare as to be unobtainable by the ordinary reader, or, possibly, whose special views upon matters political lie so buried in their general writings as to require considerable research for their discovery and statement.

In contradistinction to such an encyclopædic work, the plan of the present undertaking is at once narrower and broader. It is narrower in that, as already said, no attempt is made to present a complete *tableau* of all the political literature of the period covered.

It is broader in that the sources whence information has been sought have not been limited to the written word,

but have included contemporaneous political practice and current metaphysical and ethical speculations. As has been already suggested, the political theories of a people cannot be divorced from its political life, nor separated from the general philosophical conceptions which prevail. However abstract in form, political speculations are almost necessarily the outcome of existing objective political conditions, and have for their aim the solution of those problems that at the time seem most needful of determination. This being so, the especial effort of this work is to show that the various political speculations described were naturally born of the concrete facts of contemporaneous life. Conversely, though not in equal degree, political theories have often been influential in bringing about in actual life political developments in conformity with the principles which they have stated. Where this has been so, effort is made to demonstrate it.

In this attempt to discover the fundamental ideas that explain and rationalise the great political movements which narrative history records, this work resembles in some respects a philosophy of history. A true history should exhibit a continuous movement, a logical development from point to point, from cause to consequence. But it is only by making evident those interrelations which have existed between political theory and political fact, that this becomes possible. Except for this, there is no means of explaining why particular doctrines have suddenly appeared and been widely accepted, which to men of other and later times have appeared unsound and even absurd. Thus a satisfactory history of political philosophy, instead of presenting a series of abstract systems as apparently the arbitrary creations of their originators, should exhibit a development of thought, the phases of which are made to appear as the logical results of the conditions of political life and of the general ethical and intellectual peculiarities of the times in which they have been formulated.

In this preface it may be proper to call attention to the existing works dealing with the history of political theories. Except for the little work of Sir Frederick Pollock, *An Introduction to the History of the Science of Politics*, no work exists in English in which the attempt has been made to cover the whole history of political philosophy. Even for particular periods there is comparatively little in our language. In French and German there are a number of general histories, but none of them completely satisfactory. Janet's *Histoire de la Science Politique dans ses Rapports avec la Morale*, in two considerable volumes, covers the whole field and is probably, upon the whole, the best work that we have. But, as its title indicates, the ethical problems are made very prominent. Furthermore, there is little or no attempt made to explain the political conditions out of which particular speculations have taken their rise ; and, also, the modern doctrines of sovereignty, of the state as a legal institution, and of the proper sphere of political control, are quite inadequately treated. In German we have the excellent monograph of Rehm in Marquardsen's *Handbuch des Oeffentlichen Rechts*, entitled *Geschichte der Staatsrechtswissenschaft*, but this is a history rather of theories of public law than of political philosophies in general, and, moreover, only the period of ancient Greece and Rome is carefully treated. Of Hildenbrand's *Geschichte und System der Rechts- und Staatsphilosophie*, only the first volume, which deals with the philosophies of the ancient world, has appeared. This is an excellent piece of work. Bluntschli's *Geschichte der Neueren Staatswissenschaft* covers only the period since A.D. 1500, and gives scarcely more than a brief and quite disconnected digest of the chief writers of the years covered. Von Mohl's huge *Geschichte und Literatur der Staatswissenschaften* is a compilation of bibliographical references, rather than a history of political ideas. There is also Stahl's *Die Philosophie des Rechts nach Geschichtlicher Ansicht*, a part of which has been

translated into French under the title *Histoire de la Philosophie du Droit*. This work, however, is almost wholly devoted to tracing the development of the theories of natural law. Lasson, in his *System der Rechtsphilosophie*, gives an historical sketch of political theories, which is, however, too brief to be of considerable value. The recently published first volume of Professor Dunning's *History of Political Theories*, which covers ancient and mediæval times, deserves, however, special mention, both because of its conspicuous merits, and because it covers the period treated in this work. In his treatise Professor Dunning limits himself quite strictly to an account of political theories as they are to be found crystallised and explicitly stated in literature. Care is taken, however, to exhibit its contemporaneous facts of public life and of which these writings were born, and to point out the practical lessons which their authors endeavored to teach. But no very serious effort is made to obtain from the objective facts themselves the political presuppositions involved,—to discover the political ideas implicit in the systems of governments and laws of the times and peoples considered. In this respect the present work, which, it may be said, was in manuscript at the time that Professor Dunning's work appeared, is at once broader and different in scope. But, even where the same material has been utilised and the same topics treated, the points of view have been so unlike that the results reached supplement rather than duplicate one another.

In conclusion, the author wishes to make grateful mention of the very valuable assistance he has received from Professors George E. Howard of the University of Chicago, George W. Botsford and Charles H. Haskins of Harvard University, and Christopher Johnston of Johns Hopkins University.

W. W. W.

The Johns Hopkins University,
Baltimore, Md., June 27, 1903.

CONTENTS

PART I

ORIENTAL AND GREEK POLITICAL THEORIES

CHAPTER		PAGE
I.	Primitive Political Ideas	3
II.	Oriental Political Philosophy	13
III.	Political Theories of the Hebrews	23
IV.	General Characteristics of Greek Political Philosophy	31
V.	The Sophists	68
VI.	Socrates	81
VII.	Plato: Introductory	88
VIII.	The "Republic"	94
IX.	The "Laws": the "Statesman"	119
X.	Xenophon	131
XI.	Aristotle	137
XII.	The Stoics and Epicureans	191
XIII.	The Value of the Greek Civic Ideal	198

PART II

ROMAN POLITICAL THEORIES

XIV.	The Political Philosophy of the Romans — Introductory	215
XV.	The Development of the Idea of Positive Law	219
XVI.	Roman Theory as to the Location of Sovereignty in the State	231
XVII.	The Rationalising of the Roman Law	245
XVIII.	Polybius	268
XIX.	Cicero	274

PART I

ORIENTAL AND GREEK POLITICAL THEORIES

CHAPTER I

PRIMITIVE POLITICAL IDEAS

THE beginning of political philosophy in any very strict sense of the term dates from the time of the rise of the speculative schools of Greece, but political speculations of a more or less definite character must have existed from the time when first political institutions were established by men. However limited the range of their thoughts, from the very earliest times men must have held some sort of ideas regarding the forms of control to which they submitted their lives and conduct. Of these primitive ideas we have of course no written record, but by reasoning back from later facts, and by judging by analogy with the thoughts and customs of those peoples of whose earliest social beginnings we do have knowledge, we can tell with considerable certainty what must have been the character of the ideas held concerning political institutions when first they made their appearance among men.

One thing we know with practical certainty, and this is that from the time when any sense whatever of obligation came to be recognised by men, the ideas of religious sanction, of customary obligation, and of legal authority were so intermixed that they were not distinguished even in thought. Law and custom were practically swallowed up in religious observances. A divine sanction or prohibition was attached to almost every possible act, public or private. The individual had his gods, the family its gods, as had also the larger social and political groups. In fact, the real uniting bond in all these groups was essentially the religious one. Community of worship, rather than direct kinship or racial affinities, was the link which held the

units together. Where, therefore, religion did not restrain, there was, aside from the possible influences of affection, no restraint felt. Whatever the actual origin of any rule of conduct or principle of authority, whether the outcome of custom, force, or the natural product of kinship, the ultimate sanction was conceived to be derived from the will of the gods.

Regarding the probable successive steps by which a political and social organisation gradually developed among men, and the relation to one another of the various groups which are known to have been formed, there is no little dispute among scholars. According to the so-called patriarchal theory, to which Maine and Spencer have lent the support of their names, the primitive state of society among all early peoples, at least the Aryans and Semites, was one in which all individuals were grouped into families or households, united by bonds of kinship, marriage, or domestic service, and ruled over in a practically absolute manner by the chief male. As long as this stage persisted, the family remained the sole social unit and the *patria potestas* the only political authority. By a natural process of growth, as this theory goes on to hold, these families or households grew into clans, the clans into tribes, and the tribes, by conquest or alliance, into nations. At the same time, corresponding to this increase in communal life, the political powers of the heads of the families are held to have developed into those of the chiefs of the clans, and these, in turn, into the authority of the king of the tribe or nation, and, finally, into the sovereignty of the state.

The apparent simplicity and reasonableness of this explanation of early social and political development has secured for it a wide acceptance. During comparatively recent years, however, the whole theory has been severely, and upon the whole destructively, criticised. Anthropological research has shown quite clearly that the patriarchal type of family life cannot be held to have been either universal or primitive. Among many races of men

it would seem that the family group under the absolute authority of the father, and the tracing of relationships through him, were never known. Among other peoples where patriarchal authority is known to have prevailed, it by no means appears that it existed from the earliest times. Evidence in many cases, and analogy in others, leads to the belief that farther back in the histories of these peoples, a condition of life prevailed in which there was either a general absence of family life (promiscuity, horde-life) or families of a much lower type than the patriarchal.

More important, however, to the student of political ideas than the fact that the patriarchal family was not a primitive social unit, is the fact that the patriarch's authority cannot be held to have been the germ out of which developed by a natural process of growth, first the powers of the chiefs of the clans and tribes, and then those of the state. It is probably true that, founded as it is upon the physical facts of parentage, there existed among all races some sort of family life before any other social units were formed. But it is equally probable that long before the family grew into a patriarchal form, a grouping into tribes had arisen. In fact, aside from that temporary union of mother and child, which the helpless condition of the latter necessitates, the tribal form of association is the simplest conceivable type of social or political organisation. For its establishment and maintenance nothing more is needed than a slight feeling of friendship between its constituent members, and a recognition of its offensive and defensive value in war — a recognition which stern experience must have brought about at a very early time. For the maintenance of tribal authority no more elaborate form of government is needed than a chieftain whose right to command is founded upon a personal prowess, and whose sphere of authority is in war that of a military commander, and in peace that of an arbitrator in private disputes. As savagery gave way

by degrees to civilisation, a double development undoubtedly went on. On the one hand the political authority of the tribe increased and gradually widened its authority over its individual members, while on the other hand, within the tribe, family life increased in integrity and control until at length in many communities the patriarchal form was assumed.

The relation of the clan upon the one side to the family and upon the other to the tribe or state is a point even more disputed than that of the family to the tribe. As stated above, the generally accepted theory has been that clans were originally formed from families; that several families united to form a clan, or that single families became so large as in themselves to constitute clans. At the present time, however, the tendency seems to be to depart from this view, and to deny that, in many cases at least, the early clans developed from families or had families as their constituent units. Morgan, for instance, says that the clans could not have grown from the family, because of the practice of exogamy which so generally prevailed among early peoples.[1]

It is not necessary, however, to rest the denial of a genetic relationship between clan and family upon the more or less uncertain fact of exogamy. A better proof is that which proceeds from the fact that the aims, functions, and basis of membership of the clan are different from those of the family. The family is founded upon kinship, actual or assumed, and in it the degree of relationship is fundamental. Its head is, as a rule, determined by birth and not by voluntary selection on the part of its members, and he rules rather as owner of the persons subject to his authority than as a leader or judge over them. In the clan, on the other hand, though a certain community of blood is usually present or assumed, degrees of relationship are not recognised, or if recognised, are not held important. The real bond of union is a religious

[1] *Ancient Society*, p. 227.

one. The clan possesses a certain amount of common property, it exercises important functions in the way of settlement of disputes between its members and in rendering possible among them mutual aid and protection, but its one essential, avowed end is the maintenance of a common worship.

In membership the clan resembles the tribe. That is to say, its constituent members are the individuals themselves, and not collections of them. Its members are of course grouped into families, just as are the citizens of the states of to-day, but its elementary cells are individuals, and whatever authority it possesses is exercised directly upon them.[1]

Whether in point of time the family or the clan came first is more or less uncertain. This, however, from the standpoint of political development is really immaterial. The point is that the clan differed *in genere* from the family — that it originated not in kinship but in the voluntary association of individuals. Families may have been in existence at the time the clans were formed, but the clans were not, except possibly in isolated instances, enlarged families, nor mere families their constituent units. Rather they were artificial groups of individuals united by common interests, customs, and religious observances.[2]

Turning now to the question of the relationship of the clan to the tribe, we find that here also, according to the best opinion, the genetic connection between the two was

[1] Cf. Hearn, *Aryan Household*, p. 138. Speaking of the Roman *gentes*, Hearn says: "There were many *familiæ* of the Claudii and of the Cornelii; but there were Claudii and Cornelii before any of the *familiæ* came into existence. On the other hand there were *gentes*, such as the Manlii and the Marii, who never seemed to have branched into any *familiæ*." Upon this point Fustel de Coulanges says, however (*Ancient City*, Bk. II, ch. X, sec. 3): "The Gens was not an association of families . . . it was the family itself. It might either comprise only a single line, or produce several branches; it was always but one family."

[2] Cf. McCurdy, *History, Prophecy, and the Monuments*, Vol. III, p. 37, n.

probably, in many cases at least, the reverse of that asserted by the older and more familiar theory. That is to say, the tribe was not always formed by a union of clans, but more often the clans were formed by a differentiation of groups within the tribe.[1]

Both in their units of membership and in their form of organisation the primitive clans resembled the tribes. They were associations of individuals having common interests or connections for the sake of mutual aid, and were ruled over by chiefs whose rights of rulership were derived from their personal qualifications. The clan thus differed from the tribe rather in size and scope of functions than in essential nature. There were, however, the following differences: The fact of a general kinship was more emphasised in the clan, and the maintenance of a common worship deemed more essential. The tribe had its gods and special religious rites, just as had the clan, but community of religion was rather one of the outward symbols of the tribal unity, than the basis upon which it was founded. Primarily the tribe existed for purpose of offence and defence against other tribes, and assistance in the performance of this duty was supposed to be derived from the tribal god or gods. In the clan, on the other hand, the maintenance of a particular worship was the chief aim sought, the elements of mutual help and communal property being secondary.

Coming now particularly to the question of the origin of real political authority among men, it may be said that it is to be found in the tribe and in the control which it exercised over its members. Even if it be held that some sort of family life existed before the formation of tribal associations, the groups of individuals thus formed can hardly be said to have possessed any political characteristics. It was purely a social institution founded upon the physical facts of parentage. Its membership was thus absolutely

[1] See Jenks's *History of Politics*, p. 19, and Skene's *Celtic Scotland*, Vol. III.

limited to certain individuals, the bond of union was a temporary one, and the status of the members that of slaves to the family's head, and not that of citizens. In the case of the tribe, on the other hand, the authority that was exercised was purely political. Its chief derived his right of rule from the actual sanction of his subjects. No absolute limits were fixed to its membership, nor duration to its existence; no degrees of citizenship were recognised; so far as the sphere of its control extended, it was sovereign and self-sufficient. It was not one of a number of similar groups of coördinate power, all united into some larger associated form.

Thus when once established, the tribe was able to grow by conquest or natural increase into the nation, and its government into that of the modern state. Beginning with a jurisdiction that extended little beyond that of direction in times of war, and judgment in a comparatively few matters in times of peace, it had but to stretch out gradually its control, first by way of increase of its executive and judicial functions, and then, finally, by the assumption of a legislative power, in order to develop into the sovereign body politic of modern times. In this process of growth at no time did the political power change its essential character. The two most important steps that marked its increase of power were when it became fixed upon a definite portion of the world's soil with a result that its sovereignty became territorial rather than personal, and when it finally took to itself the function of creating civil laws. But important as these changes were, in neither case was there a break in the continuity of the state's development. The germ was in the tribe and its government, and nothing more than a process of growth was needed to produce the political organism as we now know it.

During this process of development all the intermediate political groups between the nation and the citizens have disappeared, or at most remain only as administrative

units, possessing no independent powers of their own.[1] The family of course remains, and indeed, has increased in many respects its integrity and importance, but remains what it always has been, essentially a social group. Its legal head which in early times possessed such absolute authority over its members, still possesses important patriarchal powers, but these are powers with which originally the political authority was not concerned, and which it now permits the exercise of subject to its definition and final control. From the very beginning, as Hearn correctly says, "The state is not composed of other social organisms. Its members may be members of other social organisms, and the activities of these other social organisms may or may not clash, or tend to clash, with the activities of the state. But the organisation of the state is complete within itself, and its power, within its own sphere and over its own members, is supreme. It has its own worship, its own property, its own functions, its own claims upon its members, its own duties towards them. It respects the rights and the duties of the other associations which it includes, and does not — at least in its earlier stages — seek to interfere with the relations of its members to any of those other associations."[2]

Even in those cases, if any there were, in which the family in its patriarchal form antedated the establishment of any other social or political unit, it would be a mistake to assume that out of the authority of its head the political power developed. The truth would rather be that as social integration increased, as men became more settled in their habits, as their wants grew, and as their natural interests became more numerous and important, family life and patriarchal authority became no longer adequate as

[1] In a volume which is to follow the present one, the author, when tracing the development of the idea of national sovereignty among the nations of western Europe, will speak more particularly of the manner in which the authority of the state grew at the expense of the family and the clan.

[2] *Aryan Household*, p. 318.

an instrument of social order, and thus there became necessary the establishment of a wider social and political unit whose province it should be to perform those functions which the times demanded but for the performance of which the family life and patriarchal authority had been shown to be incompetent. Thus the clan and the tribe were formed. The point to be noticed in this social and political progress is that the family group does not grow into the clan or the tribe, nor does the *potestas* of father develop into the authority of the head of the clan or tribe. Rather the larger units come into being either as additions to or substitutes for the family and its patriarchal rule.

One fact that thus stands out conspicuously in all this process of historical development, is that, until comparatively recent times, alliances or confederations, that is voluntary unions, play an exceedingly small part. Families do not unite to form clans, nor clans associate to create tribes, nor tribes confederate into nations. Where the larger units do not come first and then break up into the smaller, as in the case of the formation of clans within the tribe, the amalgamating element is force. National consolidations are brought about by conquest of the several peoples and incorporation of their lands with those of their conquerors. As a matter of fact, indeed, this is what upon reflection we might reasonably expect; for voluntary coöperation between political units is from its very nature a very difficult thing to maintain, and therefore it is to be expected that only among peoples of considerable political advancement can success be looked for in this respect. Thus all of the oriental empires were formed by conquest and not by federation. The Jews, despite their peculiar history and, as we shall presently see, the unifying force of their common worship of Jehovah, were never able to unite all their tribes into one really stable state. Notwithstanding the fact that all the Hellenic tribes felt themselves to be of one race, and as such sharply separated from all other peoples, whom they termed Barbarians, they were never

able to establish permanent unions. The Amphictyonies which they formed at a very early date never developed into associations of any considerable importance. They were entered into for particular purposes, and never developed any further, though, apparently, to the modern mind at least, they might readily have done so. In no single instance did an Amphictyony grow into a state. In most cases it did not even prevent war between its members, nor soften war's rigours except as expressly provided. So also the later hegemonies that were formed never grew into sovereign bodies politic, and the still later Achæan and Ætolian leagues that were created did not lead to the establishment of true states. The Macedonian, Parthian, and Roman empires were built up by conquest and incorporation, as were also the Aryan nations that later divided western Europe among themselves. In fine, not until the rise of the Swiss and American republics can federation be said to have been effectively employed for the creation of national states.

CHAPTER II

ORIENTAL POLITICAL PHILOSOPHY

As was said in the opening sentence of the preceding chapter, the foundation of true philosophical systems of thought as distinguished from mere congeries of independent ideas cannot be said to have been achieved until the time of the Greeks. In other words, the Orientals, who in actual point of time so far anticipated the Hellenes in the establishment of stable political life, never succeeded in so far generalising their political ideas as to create from them a system of thought sufficiently complete and logically ordered to warrant its being dignified with the title of political philosophy. In fact it can hardly be said that they have ever seriously attempted the achievement of such a task. The reason for this is to be found in those general characteristics which distinguished Asiatic life and thought from the life and thought of the Greeks.

The speculative impulse, the desire to seek for an explanation of things, is probably innate in man, and becomes active in the first stages of his intellectual development. But as history shows us, only under favourable conditions does this spirit of inquiry lead to fruitful results. Under unfavourable conditions its desires may be so crudely and summarily satisfied as to set a seal upon all subsequent and more enlightened investigation. Whether through adventitious circumstances, or national traits due to original causes now impossible of determination, the Oriental mind at an early age became so shackled by accepted canons of belief as effectually to prevent the development of truly philosophical systems of thought. Philosophy begins when men feel the need of justifying

conditions by principles which appeal to their own reason. In so far, however, as an external authority, whatever its form, whether of tradition, of church, or of state, is appealed to for the settlement of points regarding which the inquiries of men are naturally aroused, the door is closed to that path of conscious, individual, mental activity which alone leads to the discovery of truth.

Now it was this appeal to dogma rather than to reason, to faith rather than to logically grounded belief, that was and has continued to be the one characteristic of Oriental civilisation. To the early Eastern mind the fact that a thing existed was sufficient of itself to show its right to be. Thus was effectually excluded all possibility of inquiries as to the relative perfection, or justification for the existence, of *de facto* social and political institutions. All social customs, all political obligations, thus became stereotyped in fixed customs of immemorial usage,—customs either of an unquestioned binding force, or, if questioned at all, answered by the predication of an original divine fiat. Thus fixity of the rules governing conduct became the chief characteristic of Asiatic civilisation. In every particular of life, social, political, and religious, tradition and usage reigned supreme. So absolute, so imperishable, was their import to the Oriental mind, that the mere suggestion of their invalidity was in itself conceived as an impiety. Unthinking submission to them and to the powers that were, summed up the whole duty of the individual.

In his *Philosophy of History* Hegel has given us a masterly analysis of the Asiatic type of thought in this respect. "The Oriental World," he says, "has as its inherent and distinctive principle, the Substantial (the Prescriptive) in Morality. . . . Moral distinctions and requirements are expressed as Laws, but so that the subjective will is governed by these laws as by an external force. Nothing subjective, in the shape of disposition, conscience, formal freedom, is recognised. Justice is

administered only on the basis of external morality, and government exists only as the prerogative of compulsion. Our civil law contains indeed some purely compulsory ordinances. I can be compelled (*e.g.*) to give up another's property, or to keep an agreement which I have made; but the moral is not placed by us in the mere compulsion, but in the disposition of the subjects — their sympathy with the requirements of law. Morality is, in the East, likewise a subject of positive legislation, and although the moral prescriptions (the substance of their ethics) may be perfect, what should be internal subjective sentiment is made a matter of external arrangement. There is no want of a will to command moral actions, but of a will to perform them because commanded from within. . . . Since the external and internal, law and moral sense, are not yet distinguished — still form an undivided unity — so also do religion and the state. The constitution generally is a theocracy, and the kingdom of God is to the same extent also a secular kingdom as the secular kingdom is also divine. What we call God has not yet in the East been realised in consciousness, for our idea of God involves an elevation of the soul to the supersensual. While we obey because what we are required to do is confirmed by an internal sanction, there (*i.e.* in the East) the law is regarded as inherently and absolutely valid without a sense of the want of this subjective confirmation. In the law men recognise not their own will, but one entirely foreign."[1]

Under conditions such as these, the development of truly philosophic conceptions, whether in cosmology, theology, ethics, or politics, was an impossibility. Bound in their every movement by fixed doctrines of belief, deterred by the prohibitive sanctions of church and state from following out intellectual doubts to the results to which they would logically lead, it was inevitable that, however speculative their type of mind — and some of the

[1] Eng. transl., Bohn's ed., pp. 117 *et seq.*

Orientals, the Hindoos, for example, were characteristically speculative, — their inquiries should result in nothing more than the formation of crude theologic cosmologies.

In the field of politics the hindrances to the formation of an independent system of political thought were especially prohibitive. While cosmological speculations could be allowed within a certain limit, as not tending directly to interfere with that implicit obedience to the commands of the church and state which was required, no real inquiries into the nature and source of political authority, or discussions of the best forms of governmental organisations and modes of administration, could be tolerated. For the mere admission that there could be any utility in such discussions would have been, in effect, to concede that social conventions and political institutions are subject to human choice and not unalterably fixed by divine authority. Not until, therefore, what Bagehot calls the "Age of Discussion" was reached, was it possible for a political philosophy as an independent philosophic discipline to arise. Or to put this in another way, political philosophy could not begin until political liberty appeared in sufficient degree to give to the individual the right to question, in thought and word at least, the ethical bases upon which existing political institutions were founded. This time never came for Asia. Neither in theory nor in practice did the true idea of liberty appear. In none of the sacred writings is there a word in favour of political freedom and national rights. The ruler of the Vedas and of the Institutes of Menu is the autocratic monarch. It seems, indeed, that the very conception of liberty was beyond the Oriental's ken, for not even in his poetry or song did the desire for freedom once find expression.[1]

Professor Paul Janet in his *Histoire de la Science Politique* has, indeed, a chapter of some fifty pages, dealing with the morals and politics of India and China, but a perusal of it shows that while the Brahmins, the Buddhists,

[1] Cf. May, *Democracy in Europe*, Vol. I, ch. I.

and the Confucians developed interesting and valuable ethical conceptions, and founded upon them social institutions and conventions that have been of importance in actual political life, no distinct political theories were produced. Short sentences and aphoristic sayings upon matters political occur in early writings of the East, and some of these, as for example a number of the reputed declarations of Mencius the disciple of Confucius, are surprisingly liberal. But confused as these sayings are with religious and ethical dicta, and wholly unrelated to any general principles that have been previously established, they can scarcely be of value to the historian of political philosophies.

But though the early Oriental nations cannot be said to have developed a system of political philosophy, they did of course have political ideas, for the politics which they established must have rested upon some more or less consciously recognised principles or presuppositions. These principles or presuppositions were, however, of so simple as well as of so uniform a character that a statement of them is a comparatively easy task.

Powerful military states were established, but the basis of their unity was quite different from that which creates and supports political rule in modern times. Language and race, now recognised as the most powerful of politically unifying agents, exercised among the Asiatic Semites and Africans an influence distinctly inferior to that of religion. The one vital and continuing bond that drew together and kept united the Assyrians, the Babylonians, the Egyptians, and the Hebrews alike was the common worship of some particular god or gods. Each nation conceived itself the possessor of deities who gave to their worshippers the powerful support of their good will whether for purposes of defence or aggression. A general peculiarity of this belief was, however, that in some way these gods were the gods not so much of particular peoples as of particular territories, though it was held that

their sway might be indefinitely extended over other lands by military conquest. Thus it was held that a tribe or nation migrating or transported to another country was obliged to forsake its former gods and take up the worship of the gods of the places to which they travelled or were carried. Thus also a conquered people continued the worship of their own gods, though of course recognising the preëminence of the gods that had demonstrated their power by giving the victory to their conquerors.[1]

"The form of government was in every case a monarchy; the monarch was always hereditary; and the hereditary monarch always a despot."[2] At times certain checks upon the exercise of autocratic power may have been attempted, but in almost universal practice the ruler's will knew no hindrances other than those arising from his own feelings of humanity, his self-interest, his religious superstitions, or the knowledge that there were limits to the endurance of even the most submissive of subjects.

Egypt has left us no written record of her constitutions and laws. From archæological remains, however, and from the writings of Diodorus Siculus and Herodotus we know that throughout all the centuries of her history an hereditary monarch ruled over the state, and was assisted by a numerous and well-organised body of administrative officials. These two writers report also that the rule of these successive absolute rulers was rendered wise and moderate by the influence exercised over them by the traditional customs of the peoples over whom they reigned. In all probability, however, such was rather the theory than the usual practice. The final basis of the right to rule in Egypt, as in the Asiatic countries, was purely theocratic in character. The Egyptian Pharaohs were often regarded, apparently, not simply as the vicegerents of the gods, but as gods themselves. The Pharaohs styled them-

[1] Cf. McCurdy, *History, Prophecy, and the Monuments*, Vol. I, pp. 63 *et seq.* The above does not apply to the Hebrews.

[2] Rawlinson, *Manual of Ancient History.*

selves variously as sons of the Sun-God, as the Great God, the Good God, etc. One inscription declares that "the King is the image of Ra among the living." "The Egyptians," says Diodorus, "respect and adore their kings as the equals of the gods. The sovereign authority with which Providence has invested the kings, together with the will and the power to confer benefits, seems to them a manifestation of the deity."

Though viewed as gods and as such amenable to no one for the manner in which they ruled, the Egyptian kings had in fact, as is well known, their freedom of action very considerably limited by religious checks. The priests constituted a very powerful political force in the state. Much of the land of the country was in their hands, their offices were hereditary, and practically all secular as well as religious learning was possessed by them. Some historians have gone so far as to maintain that the priestly class exercised the real governing power. However this may have been, the fact remains the same to the historian of political ideas that the government was and remained essentially theocratic in character. Divine sanction was supposed to support every exercise of political power: no shadow of a system of individual rights ever made its appearance. Under a régime such as this there could of course arise no discussions of the reasonableness or utility of political authority in general nor considerations of the relative merits of different forms of governmental control. The absolute acceptance of the pure theocratic idea would have rendered nonsensical such discussions had they arisen or been tolerated. But as a matter of fact we have no reason to believe that they ever did arise. Religious dogma ruled the inner realm of mind even more absolutely than did monarchical despotism the outer world of fact.

The characteristics of the political thought of the early Semitic, Mongolian, and Aryan races of Asia were much the same as those of Egypt. Political authority rested

upon a theocratic basis, and all laws were conceived to derive their sanction, if indeed not their actual verbal form, from the will of the gods. Assyrian, Babylonian, and Persian kings do not seem to have been worshipped as being themselves gods, as they were in Egypt. Rather they were regarded as human agents of the gods. Also, except in Babylon, there were no powerful priestly classes corresponding to the priestly caste of the Egyptians. There was never established an hereditary aristocracy or nobility. Instead there was a complete equality of subjects — an equality such, as Lenormant observes, as a despotism finds most favourable to its existence.[1]

The Babylonians and the Assyrians, as also the Hebrews, deemed it one of their especial duties to spread the authority of their respective gods over as many people as possible, the instrument of propaganda of course being military force. The victories thus obtained were almost uniformly ascribed to their gods, and the punishments inflicted upon the conquered declared to be commanded by them. Unlike the Hebrews, however, as we shall see, the sacerdotal power in Assyria was not exclusively in the hands of a priesthood, but was exercised in part by the monarch himself. The king was himself a medium through whom the gods were worshipped and prayer and sacrifices made, and he often expressly described himself as the High Priest of Asshur.

The greater nations of ancient Asia contributed to political thought the imperial idea. This idea, however, as they exemplified it in practice, was one quite different from that which the modern world knows. Their empires were vast collections of loosely united states rather than single integrated political bodies. Even in their most developed forms they never became much more than great tax-gathering institutions, maintained by military force. In many cases the dependency of the parts extended no further than the payment of yearly tribute and the for-

[1] *Manual of Ancient History of the East*, Vol. I, p. 423.

mal acknowledgment of the suzerainty of the imperial monarch. In not a few instances the obligation to pay this tribute rested not upon a formal submission made after military conquest, but was the outcome of a gift, voluntary at first and as an evidence of good-will, but later insisted upon. In other cases they were the conditions of formal alliances, and in still others, and more frequently, the exactions of a conqueror. But whatever the manner in which submission and subjection was brought about, the almost universal rule was to allow those subject nations that did not continue fractious and rebellious to maintain their national existences and to preserve practically unchanged their own peculiar institutions, laws, and customs. In cases of insurrection, punitive expeditions would be sent, and, after reconquest, heavier tribute exacted. Where the resistance was continued or repeated, conquest would be followed by a destruction of the political autonomy of the conquered people and the sending of satraps to rule over them. Finally, in extreme cases, the very existence of the conquered people as a nation would be put an end to, either by wholesale slaughter or by the deportation of the remaining inhabitants, or at least of their priests and leading men, to distant parts of the empire. This was the fate which the Jews brought upon themselves by their resistance to the Babylonians. In this case it is probable that only the chief men and priestly leaders were exiled, but in thus removing the agents through whom alone the religion of the people might be exercised the one effective bond of national unity was taken away.

From an administrative standpoint these vast Oriental political aggregates never reached a stable stage of development. Where the tributary peoples were allowed to retain their own rulers and institutions, national aspirations were necessarily kept alive, with the result that Oriental history is in large measure a record of successful and unsuccessful rebellions of dependent states against

their imperial rulers. Even in those cases where the national life of conquered peoples was destroyed and their territory incorporated into that of their conquerors and subjected to direct imperial control, the administrative machinery provided was of the simplest character. Into each such province a governor or satrap was sent who in his powers and methods of government was to his province what the king was to the whole empire. His rule was absolute, and aside from maintaining order and furnishing military aid when required, his sole obligation to his imperial master was the yearly transmission to him of a certain amount of treasure. The despotic rule of the central government was thus divided, and to an extent delegated, but never relaxed.

CHAPTER III

POLITICAL THEORIES OF THE HEBREWS[1]

THE theocratic ideas of the Jews, because of certain peculiarities which they displayed, merit special mention.

The Hebrews differed from the other Semites in that their god Jehovah early became dissociated from any particular place and became instead the god of the Hebrews as a people, that is, a guiding and protecting deity that followed them wherever they went, and remained with them even during political captivity. Furthermore, though the Jews never were able to come together into a single united people and establish a single sovereign state, they came nearer as a people to forming a nation, in the modern sense of the term, than did any of the other Semitic tribes, though the bond of union was still preëminently that of religion rather than of race, language, or historical tradition. They became and remained more truly a nation because their national religious aim was a higher, more spiritual one than that of their conquerors, — one that found its expression not simply in formal worship nor its realisation in military success, but which demanded of the individual worshippers holiness and justice in their lives. Thus, as McCurdy correctly says, "In spite of its limitations, its remains of tribal rudeness and barbarism, its internal troubles, its frequent disloyalty to its theoretic

[1] The chief works consulted in preparation of this chapter are as follows: McCurdy, *History, Prophecy, and the Monuments*, 3 vols.; *Encyclopedia Biblica*, articles "Law and Justice," "Government," "Israel," "Deuteronomy," "Canon," etc.; *Historical and Critical Contributions to Biblical Science*, essay by Kent and Sanders, "Growth of Israelitish Law;" Kent, *The Messages of Israel's Lawgivers;* Janet, *Hist. de la Science Politique;* Abbott, *Life and Literature of the Hebrews.*

ideal, the United Kingdom, as well as its legitimate successor the Kingdom of Judah, had still within it the main element of a durable nation — a degree of individual freedom, a sense of justice and of equal rights to all, elsewhere unknown, and a steady outlook toward a wider national future and a boundless destiny. They were a 'people' as no other nation was, because they were and knew themselves to be 'the people of the living God.'"[1]

Fundamentally the law and the authority of the Hebraic state was conceived to rest not upon the will of its rulers, nor yet, in any creative sense, upon the will of the ruled. The origin of all obligation was discovered in the will of Jehovah. In His will was found the legislative source of the basic principles by which society was held to be bound together and controlled. These laws, therefore, men might neither make, destroy, nor amend. Because of their source they were regarded as eternal, absolute, and binding upon rulers and ruled. Yet there entered into Jewish thought the idea of popular consent. Though not regarded as having made, or as capable of making, the laws, the people were held, as we shall presently see, voluntarily to have accepted the rule of the Almighty. Moses, after having received upon Mount Sinai the Ten Commandments, was said to have come down to his people, and to have asked them whether they would accept Jehovah as their king, and His laws as their laws, and "all the people answered and said, 'All that Jehovah hath spoken we will do.'" Thus the people were held to have entered into a contract of obedience with God in return for His divine favour and protection; and the book containing the Commandments came to be called the Book of the Covenant — indeed, the whole collection of books in which this book was included, received as its title the "Old Testament," or "Old Covenant," and the idea of a contractual relation between Jehovah and His chosen people appears throughout their history. Thus it is with truth

[1] *History, Prophecy, and the Monuments*, Vol. I, p. 70.

that Dr. Abbott says: "The prophetic indictments of Israel were not merely because they had violated the divine law, but because they had broken their covenant with their God. The law was not imposed upon; it was accepted by them; its authority was divine, and they had recognised their obligations to obey it. There are no threats of punishment in a future life; there are no promises of reward in a future life; no priesthood is vested with power to enforce the law by appeals to superstitious fears, as the law was enforced in the Middle Ages."[1]

In fine, then, the laws, though accepted by the people, were never conceived as created by them. Through their covenant with God the people became additionally bound, and the sinfulness of disobedience correspondingly increased; but, fundamentally, the laws were recognised as binding because of their divine source and essentially moral character. That is to say, they appealed to the consciences of the people who had received them. Obedience was not regarded as simply a *quid pro quo* given in return for divine favour and protection.

Not only were the laws of the nation held to have been given by word of mouth from God, but He was looked upon as One who might be consulted upon all important occasions, and who would give direct responses through his selected agents.

From time to time prophets and judges appeared, to whose words were accorded especial belief and obedience, as voicing the will of God. These leaders were never elected, nor did they gain their titles and authority by heredity. Such authority as they were recognised to have came from their own natural abilities and force of character. Thus the Hebrew government, though theocratic as regards the conceived source of its authority and law, was not regarded as sacerdotal in character. The priests never formed a class or caste as they did in Egypt and India. They possessed no property, they held no

[1] Abbott, *Life and Literature of the Hebrews*, pp. 110–111.

office of the state, their functions were of a purely religious and ethical character. The Israelitish state, though usually and indeed correctly termed a theocracy, was thus not a government by priests. At times, indeed, as in the case of Eli and Ezra, the political rulers were also priests, but this was a result of individual worth, not of sacerdotal character. In general the kings as well as the great judges were not priests. Moses himself, indeed, was not one. He was a prophet, a military leader, a lawgiver and a judge, but not a priest. This worship of the one great god Jehovah was the real bond that bound together the Hebrew tribes; and the greatest triumph of Moses was in the establishment of a common sanctuary, a single priesthood, a uniform ritual for all the clans which followed him out of Egypt. He thus became not only his people's deliverer but the founder of their united nationality. From being simply a tribal sheik, he became the head of a commonwealth. That he himself recognised this fact is shown in the establishment by him of judicial and administrative tribunals founded upon a local and territorial and not a clan or tribal basis. (Exodus xviii. 25 f.) Still, up to the time of the establishment of the monarchy, Israel can hardly be said to have been in any true sense a single state. There was no complete central organisation. The idea of common brotherhood grew very slowly, and in the end required the stimulus of threatening annihilation at the hands of the Philistines before it made itself effectively felt. And even then the tribes united into two political bodies rather than into one, and these two bodies never really coalesced into a single body politic.

It is a remarkable fact, as the Old Testament tells us, that despite their theocratic beliefs, the establishment of monarchy among the Hebrews was not due primarily to the will of God, but to a request made of God by the people themselves and unwillingly granted by Him. But in becoming monarchical the Hebrew government did not lose its peculiar theocratic character. The first king was

chosen by God through Samuel as a priestly intermediary, and when Saul proved unfit it was Samuel as priest who deposed him and chose his successor.

The democratic element in the Jewish monarchy was shown not only in its origin, but in the parts played by the people both in the creation of codified law and in the censorship exercised by them over the conduct of their kings. The Hebrews never came to view the acts of their rulers as removed from criticism. Jehu's massacre was regarded with general detestation. The power of public opinion was shown in Nathan's reproof of David. Prophets like Elijah and Elisha did not hesitate openly to voice popular discontent, and the experience of Ahab and Solomon sufficiently shows the actual power that lay back of the people's will. But the most conspicuous manifestation of the democratic element in the Hebrew polity was in the part played by the populace in the reduction of their laws to a definite codified form.

The Jewish law in its early development went through practically the same stages as that through which, as we shall later see, the Greek and Roman law passed. First was the period of divine law pure and simple, when all the laws governing human conduct, whether individual or social, were conceived as derived from direct divine dictation. Jehovah was regarded as declaring to his priests the decision that they were to render as each particular dispute was submitted to them for judgment. The term used to denote the law thus established was "torah," — a word coming from a root meaning to cast a lot, to direct or decide. Later the word came to indicate the whole body of the law, written and unwritten, civil and religious, but in the beginning it meant simply a judgment, corresponding in this respect to the Greek use of the word *Themis*.

By an almost inevitable process these judgments thus severally rendered came to constitute precedents, and to serve as the material upon which to base more or less general rules or laws. The sanction for these laws continued

purely theocratic. The priests, the prophets, and the judges interpreted them, but did not claim the power to create or amend them. The people accepted the laws because they believed them righteous; they obeyed their judges because they beheld in them individuals whom the Divine Spirit had raised up and endowed with wisdom and piety for their direction. Their judgments were regarded more as arrived at by intuitive perception than as determined by exact law or precedent; and their right itself to pronounce judgments rested upon no grant of legal authority from the state. They officiated simply as oracles of the will of Jehovah.

Besides these sacerdotal tribunals, there were, according to the regulations laid down by Moses (Exodus xviii., 25 f.), local courts held by the elders and tribal chieftains for the trial of ordinary cases which might be decided by principles already well established. But all new or difficult questions were referred to the priests. Even in the days of the monarchy, when like other Oriental rulers the kings exercised judicial powers, the highest court still remained a priestly one (Deut. xvii. 8 ff.). To a tribunal at the central sanctuary, composed chiefly, if not entirely, of priests, it was expressly provided in the Deuteronomic Code that all difficult cases should be referred, that thus the decision or *torah* of Jehovah himself might be obtained. Thus the priests, until the time of Nehemiah, at least, were the real legislative organ of the Jewish state.

Though the Hebrews thus believed that they might at any time obtain an authoritative, divine torah upon each case as it arose, two forces operated finally to compel the establishment by them of an authoritative code of laws. In the first place the need came to be felt for some means whereby uniformity in decisions of local and tribal judges might be secured; and, in the second place, it became necessary to bring back to the people's minds principles and precepts that they were in danger of forgetting.

Thus there was drawn up in the eighth century B.C. the so-called Book of the Covenant (Exodus xx. 22–xxiii.). Whether the laws were then for the first time reduced to writing is not certainly known. The probability is, however, that an earlier written version had been drawn up by the priests in the ninth century but never promulgated. Though spoken of as a code, the Book of the Covenant does not contain statements of general rules or abstract principles. In form it is nothing more than a collection of decisions in special cases arising out of occurrences of everyday life. As regards its authoritative character, furthermore, it is to be observed that we are not told as to the manner in which it was ever promulgated as law, or, in fact, as to whether it ever really was officially declared law, for containing as it did no new enactments, it needed no formal establishment.[1]

In the latter half of the seventh century, however, there was prepared and officially promulgated a veritable code. This Deuteronomic Code (Deut. xii.–xxvi., xxviii.) was in origin a private work, and included all the earlier laws which its authors deemed deserving of perpetuation. In motive the aim was to offset the degrading Assyrian influences of the time by recalling the people to the laws and customs of their fathers. Thus it was provided that every seven years the whole of it should be read aloud to the people, and that portions of it should be repeated daily. Though it purported to declare no new rules, and was indeed given out as from the mouth of Moses himself, this new code did in fact greatly change existing law, so greatly indeed that it had required years of priestly exhortation to prepare the way for its publication. The manner in which it was finally established as binding law is extremely significant as illustrating the presence in the Hebrew commonwealth of that democratic element of which earlier mention has been made. "And the King sent, and they gathered unto him all the elders

[1] Cf. *Encyclopedia Biblica*, Art. "Law and Justice."

of Judah and of Jerusalem. And the King went up into the house of the Lord, and all the men of Judah and all the inhabitants of Jerusalem with him, and the priests, and the prophets, and all the people, both small and great: and he read in their ears all the words of the book of the covenant which was found in the house of the Lord. And the King stood by a pillar, and made a covenant before the Lord, to walk after the Lord, and to keep his commandments, and his testimonies and his statutes with all their heart and all their soul, to perform the words of this covenant that were written in this book. And all the people stood to the Covenant."[1]

From 621 B.C., the date of this public presentation of this Deuteronomic Code, the law of the Hebrews became established upon a definite written basis. Unwritten law was of course not wholly replaced, and new laws continued to be created by precedents and custom, but henceforth legal rights and duties were determined by fixed provisions with which all could familiarise themselves, and the legislative and interpretative power of the priestly tribunals became correspondingly lessened. In the year 444 B.C. the codification of the Jewish law was practically completed by the adoption by the people in a great assembly of the Priestly Law which had been brought to Jerusalem from Babylon by Ezra the Scribe (Ezra vii., Nehemiah viii., ix.).

For the purposes of this work it is not necessary to trace the further development of the Jewish law. From this time forth the Hebrew Scriptures were declared canonical, and there was an increasing tendency toward an exaltation in actual control of the spiritual over the secular power. The priestly interpretation of the books of the law more and more degenerated into dead literalism, and ceremonialism and ritualism increased, so that in the end religion became a heavy burden upon the people. In all this, however, it can hardly be said that any distinctively new theocratic elements were developed.

[1] 2 Kings xxiii. 1–3.

CHAPTER IV

GREEK POLITICAL PHILOSOPHY: GENERAL CHARACTERISTICS

When we turn from the consideration of the characteristics of Oriental life and thought to an examination of Hellenic conceptions of religion, morality, and the state, a contrast is revealed of so marked a nature as to indicate that the two systems of thought could scarcely have had a common origin, and that the earlier Aryan and Semitic theories could have had very little influence upon the development of the later Greek philosophies.[1]

The Greek religion was essentially naturalistic. That is to say, its deities were conceived as finite beings, differing from human beings only in degree. But, though naturalistic, the Greek theologies were immeasurably superior to the naturalistic religions of the Asiatic nations. To the educated Greek, man, as a moral, rational being, represented Nature in its most highly developed and perfect form. The distinction between the body and the spirit, between the mind and matter, was very clear to him, and that which in his eyes separated humanity from the rest of Nature was the possession by men of the power of thought and of a self-consciousness of a spiritual nature as distinguished from his physical side. Because of this

[1] As to the lack of kinship between Oriental and Greek philosophies, see especially the introductory chapter to Zeller's *Pre-Socratic Philosophy*. It should be observed, however, that there is a tendency on the part of the scholars of to-day to give more credit to Eastern influences upon Greek thought than is admitted by Zeller, but whether this more modern view be the correct one or not, the Asiatic contribution was not of sufficient importance to modify the positions assumed in this chapter.

the Greeks felt themselves of kin to the gods, and because of this kinship, in yielding to the demands of the gods, they had not that feeling of subjection which was characteristic of Oriental thought. In the demands of the gods they recognised the utterances of right and of reason. Thus, though they looked upon themselves as parts of great Nature, and held it to be their highest aim and duty to harmonise their actions with the laws of universal order, there was almost wholly absent that characteristic Oriental sense of subjection to an alien and mysterious fate.[1]

That the universe constituted a cosmos and not a chaos was a fundamental tenet of Greek thought. In the facts of the phenomenal world the Greeks saw the products of a creative Reason, and in the forces of Nature the operation of laws susceptible of rational interpretation. Thus to them Nature was something eminently understandable. Every particular object was conceived as existing for some purpose, that is, as having some definite part to play in the economy of the world, or, as they expressed it, as having some "good" or end. To the Greeks Nature was thus not something awful, terrifying, or revengeful, but something beneficent and essentially friendly. In worshipping Nature they deferred not to its physical or objective forces, but to those features as personified and spiritualised.

"The natural holds its place in their minds only after undergoing some transformation by spirit — not immediately. Man regards Nature as only an excitement to

[1] We are here speaking, of course, of the educated Greek of the periods subsequent to the rise of the philosophic schools. In the early monarchical times, as we shall presently see, the theocratic element in political government was quite prominent, and this idea of obedience without subjection could hardly have been pronounced. Even in later times, when in philosophic thought the idea of Nature as itself creative and legislative (*natura naturans*) was substituted for the personal authority of the several gods, the ordinary Greek citizen undoubtedly viewed as direct demands of the deities what the philosophers considered as laws of Nature.

his faculties, and only the spiritual he has evolved from it can have any influence over him. . . . The Greeks listened to the murmuring of the fountains, and asked what might be thereby signified: but the signification which they were led to attach to it was not the objective meaning of the fountain, but the subjective — that of the subject itself, which further exalts the Naiad to a Muse. The Naiads or Fountains are the external, objective origin of the Muses. Yet the immortal songs of the Muses are not that which is heard in the murmuring of the fountains: they are the productions of the thoughtfully listening spirit — creative while observant. The interpretation and explanation of Nature and its transformations — the indication of their sense of import — is the act of the subjective spirit; and to this the Greeks attached the name *μαντεία*. The general idea which this embodies is the form in which man realises his relationship to Nature."[1]

Because of this attitude in which the Greeks stood toward their gods, we find their religious institutions differing widely from those which prevailed in the East. The Hellenes had no fixed dogmas or beliefs, and no exclusive priestly class to mediate between them and their gods. Among them, as among the Romans, religion was a matter of personal conscience. It was one of the rights of each individual as a free human being himself to approach the altars and to offer sacrifices and prayers. Priests were needed only to preserve sacred traditions and to see that the religious ceremonies attached to the performance of particular religious acts or to the worship of particular deities were observed. Because of their knowledge and functions, the priests were viewed with special reverence, but they never constituted a caste or order in the state or withdrew themselves from the ordinary pursuits of public and private life. In a certain sense the Greeks were in truth not a particularly religious people. They

[1] Hegel, *Philosophy of History*, p. 244.

held that each state had its special religion, and each god its special service. Religion accompanied almost every act, whether public or private. But they were not a believing people. Very few of their religious principles were reduced to definite statement, and the acceptance even of those was not of that absolute character which characterised the faith of the Asiatics. In the very earliest of their writings we find them treating their gods and many of their religious faiths with a singular freedom and scepticism. The doctrine that man's highest welfare was bound up in the acceptance of some particular theological tenets appeared to be unknown. No devil worship was there to terrorise the heretic. Hence there was the greatest tolerance of variety in dogma and worship. Persecution for the purpose of obtaining uniformity of belief was never practised. Offences against a city's gods were punishable as endangering the welfare of the state, but private opinion, short of absolute unbelief, was freely permitted. Thus, as Fiske says of the Greek: "His hospitable polytheism left little room for theological persecution, and none for any heresy short of virtual atheism. The feverish doubts which rack the modern mind left him undisturbed. Though he might sink to any depth of scepticism in philosophy, yet the eternal welfare of his soul was not supposed to hang upon the issue of his doubts. Accordingly Athenian society was not only characterised in the main by freedom of opinion, in spite of the exceptions of Anaxagoras and Socrates, but there was also none of that Gothic gloom with which the deep-seated Christian sense of responsibility for opinion has saddened religious life."[1]

Such theological doctrines and sacred rites as the Greeks recognised as binding were founded upon tradition, and were by no means the same in different communities. With religion freed from stereotyped forms and absolute

[1] Essay on "Athenian and American Life" (*Unseen World and Other Essays*).

dogmas, and with each citizen at liberty himself to draw near the altars of his gods, room was left for an exercise of individual reason and fancy, from which the Oriental was effectually excluded. It was out of the opportunity for independent thought thus provided that real philosophy and true political liberty first appeared in the world.

President Wheeler, in his recent life of Alexander the Great, has stated with such admirable clearness the contrast between this Greek spirit and that of the Orient, that an extended quotation is justified. "The Hellenic spirit," he says, "was characterised by a consciousness of the individual right of initiation. The Greek's jealousy of every institution and man that assumed to interfere with the free service of that right is responsible for his leaning toward democracy, his envy of greatness, his frequent change of political position, and his failure to create and operate elaborate political machinery for any other than local government. Whatever his view concerning the domain of the gods, and their right to rule his world, he was in his practical philosophy a pluralist, not a monist, and the world of life was constituted out of free-moving, self-determining personalities. Only when they rose above the proper estate of men and intruded themselves within the province of the gods did the free exercise of personality amount to the hybrid which merits and meets rebuke. Within the bounds of human estate the law of action is determined by the purposes and interests of the free personality, and not from without or from above. The state is that within and through which alone the person exists and possesses his freedom. It is the very condition of existence, but it is not that which originates for the person the law of action. To the Oriental, on the other hand, the universe as well as the state, is conceived of as a vast despotism, which holds in its keeping the source and the law of action for all. Its mysterious law, held beyond the reach of human vision, like the inscrutable will of the autocrat, is the law of fate. Personality

knew no right of origination or of self-determination ; it was swept like a chip in the current. It knew no privilege except the bow of resignation before the unexplained, unmotived mandate of fate. The Oriental government of the universe was transcendental, the Hellenic social. The Hellenic gods were the chief citizens of the state, partakers with men in a bond which was made sacred by their presence. To be associated with them was a privilege. They gave dignity and solidity to society. To show them disrespect was treason, and treason was essentially a discourtesy and insult to the gods. The Greek was always human — very human. His humanity was never apologised for. It was the best thing that he knew of. This sunlit life on earth was worth living for, indeed, the only thing he knew of worth living for. Whatever was human, the body and the joys of the flesh, the delights of beauty, the triumphs of wit or of strength or of craft — all were good except in excess. Virtue lay not in abstinence, but in self-control. . . . The Greek lived in the world of Nature, or as a part of it, and good friends with it. In it lived his gods, and through its activity his gods revealed themselves. The Greek dwelt more with the world that was without him. . . .

"The Greek seemed to have the world before him. He could do what he would. Conditions could be changed. The right of initiative gave the right to change. The power of initiative imposed the duty to create. Life was composed of time, and time was measured by action. Action creates, and creation is progress. Action, aggression, achievement, progress, became, therefore, the spirit of the Greek : Endurance, submission, quietism, stagnation, that of the man of the East. In all this the Greek was merely the full-developed type of the European Aryan."

The Greek Idea of Law

The most essential idea connoted by the term *law* is that of order or uniformity. A law, in other words, using

it in its most general meaning, states a rule or principle in accordance with which certain classes of natural phenomena are conceived to occur, or in conformity to which it is desired or expected that men shall shape their conduct. Analysing the idea further than this, it is found that laws may be sharply distinguished from each other according to : (1) the source whence their binding authority is conceived to come, (2) the means by which their contents are made known to or are discoverable by men, (3) the character of the facts or acts to which they apply. As regards the source whence their authority is conceived to be derived, this may be ascribed to a god or gods, to great Nature as creative or legislative (*natura naturans*), to the reason of each individual man (Kant's *sic volo, sic jubeo*), or to the fiat of some human authority. As regards the means by which the contents, *i.e.* the specific prescriptions, of laws, are made known to men, this may be either by way of direct divine revelation (the *lex divina* of Aquinas), by the individual reason, by custom and tradition, or by the published will of human legislators. As regards the character of the facts or acts to which they are to apply, laws may be either statements of sequences of causes and effects as observed in the phenomenal world, or they may express canons for the guidance of men's conduct. In the latter case, they may have reference solely to the internal acts of the will, and for this reason are termed moral, or they may be regulative of outward acts, in which case they may be social or political according as they refer to conduct socially or politically significant. In the one case the sanction or coercive power is supplied by social disapprobation in the event of their violation, in the other by penalties determined and applied by the politically governing power. In this last case, laws are described as political or positive. By political or positive law, then, we understand a command issued by a political superior to a political inferior, — from a sovereign to a subject, — ordering that something be done or not

done, as the case may be, and threatening a penalty in case of disobedience. To use the language of John Austin, "Law is the aggregate of rules set by men as politically superior, or sovereign, to men as politically subject."

Of these distinctions, and others which it is not necessary to mention, a clear comprehension is a prerequisite for the formulation of definite ideas as to the nature of law, whether political, religious, social, or natural. In determining, then, the extent to which the Greeks in their political philosophy were able to arrive at just conceptions of the nature of positive or political law as we now define it, it will be necessary to determine the extent to which these distinctions which we have mentioned were perceived by them.

In primitive Greece, as in all other nations of whose early history we have record, a theocratic organisation of society and the state prevailed. Church and state were not distinguished, civil law and religious ceremonial were traced to the same divine source, the administration of political and priestly functions intrusted to the same hands. At this time, so far as we know, or may judge by inference, there was very little reflective thinking regarding the nature and source of obligation, whether religious or political.[1] As in the rest of the world, custom and tradition governed, their prescriptions being handed down from generation to generation without criticism, and without examination. Theirs was the world that is disclosed to us in the writings of Homer and Hesiod. Right, so far as it was recognised as having an existence independent of might or tradition, was conceived as founded wholly upon the will of the gods; and allegiance to the family, the clan, and the city was regarded as primarily a religious duty. Roughly speaking this mode of life and thought may be said to have existed up to the sixth century B.C.

[1] "We discover a government . . . in which the mainspring of obedience on the part of the people consists in their personal feeling and reverence towards the chief." Grote, *Hist. Greece*, Pt. I, ch. XX.

At the time that the Greeks first appear upon the horizon of history, monarchy was the prevailing governmental form. The king of Homer was at once the military leader, the civil ruler, and, as the representative of the chief families of the state, the head priest of his community. As civil ruler, he was both the interpreter and administrator of the unwritten law of his people. But he was never viewed as its creator. In the exercise of his duties as judge he appeared as but the mouthpiece of Zeus, the keeper of his ordinances. His decrees were considered as determined by instructions divinely dictated.[1] This divine inspiration was conceived to come through a goddess known as Themis, and the judgments which were rendered were thus termed Themistes.[2]

[1] The king was not, however, conceived as the only representative of Zeus. The nobles participated with him in the administration as well as the knowledge of things divine. In judicial matters, indeed, the council at times acted without the king.

[2] "The word *Themis* with the entire group of its kindred terms, points to that phase of conception in which the phenomenon of permanent order begins to be recognised in human life and society, but one still looked upon as merely of a mysterious and directly superhuman nature, — now deified in themselves, and now again venerated as divine attributes. Hence we find Themis figuring in Homer as the personification of order, as the leader of divine revels, or the summoner of divine assemblies, as the protector of human deliberations in council, as the guard over the gathering and dissolution of these councils, and, at the same time, as destiny and right custom. In Hesiod it figures as the sister of memory, or the spouse of Zeus, and as the mother of order, justice, and peace. In Pindar it is regarded as the protecting goddess, and as the fellow judge of Zeus; and, subsequently, as divine law itself and as that which is generally right. In this connection the verbs θεμιστεύειν and θεμίζειν in the meaning of 'to govern' or 'to judge,' present themselves: further, the Themistes as the primary dispositions of the Divinity; and again, the Themistes as the principles of justice divinely established and sifted out by the judge, and which are, at the same time, the propositions of divinely derived law and order, established in part immediately by the gods themselves, and in part by divinely inspired men, and reaching far beyond historical memory, or being the application of principles of such a nature to new circumstances. The concrete institutions, again, of a purely religious character, which are ranged under these rules of law are the ἱερα καὶ ὅσια, referring to acts concerning divine worship, funeral ceremonies, sacrifices, and mourning, the sacredness of which stand above human

"The word *θέμις*," says Clark, "is undoubtedly derived, like the later *θεσμός*, from the root ΘE, *to set* or *appoint*, to which the noun *θεός*, *God*, is ultimately referrible. Derivationally, then, it means that which is appointed or ordained. With this idea of ordinance, and the special idea of ordinance by Heaven, agree by far the largest class of passages where *θέμις* appears: . . . In the pathetic death of Patroclus, whom Achilles' helmet could not save, . . . *θέμις* is clearly the destiny of Heaven. In this sense, *θέμις* almost exactly answers to the Latin *fas*, which is what is right as the word of God, the opposite being *nefas*. With the dative case, *θέμις* passes through what is right for people to do, almost into the signification of mere usage, but always, I think, proper usage, *i.e.* such as would be allowed by Heaven. . . . Θέμιστες in the plural . . . appears to be ordinances, prospective orders, or principles of justice proceeding from Heaven, and given as Heaven's commission to a king or judge, which a just judge does not forget, but sifts out in straight judgments. . . . Θέμιστες are also the prospective decrees of Heaven in the way of destiny, and hence, though rarely, oracles."[1]

In the Homeric or prehistoric period of Greece, then, we may say that the theological conception of law reigned practically supreme. That is to say, so far as an attempt was made to search out the final legislative source of the principles of conduct to which men were considered obligated to conform, a special divine dictum for each one was provided. As yet the idea of uniform, invariable, and,

dispositions, and which, like Themis itself, have their foundation not in *κράτος*, the authority of power, but in *δεσμὸς*, the bond of destiny." Pulszky, *Theory of Law and Civil Society*, p. 332.

[1] *Practical Jurisprudence*, p. 44. Sir Henry Maine (*Ancient Law*, p. 4) speaks of themistes as being the plural of themis. There is, however, thinks Clark, some question as to this. He says (*op. cit.*, p. 43), "Curtius is apparently right in considering with Meyer *θέμιστες* not to be the plural of the original *θέμις* which makes *θέμιδος* and *θέμιτος* in the genitive, but a secondary formation, generally occurring in the plural from an intermediate verb *θεμίζω*."

therefore, permanent principles of right for the government of men's conduct does not seem to have arisen. Political and religious commands appeared as single independent judgments, unconnected by general principles. This being so, the idea of the deity as dictating a code or complete body of laws was of course beyond their intellectual reach, and did not appear until some centuries later, when monarchic had generally given way to aristocratic rule.

The idea of customary law as of at least presumptive or relative validity must have been held, even though we find in Homer no word to describe it. Plato says in his *Laws*, "For surely to those existing at that portion of the period there were no writings, but they lived following the customs of the spoken laws of their ancestors."[1] Also, as we have already said, we find that the nobles shared with the kings the exercise of judicial functions, and this joint competence must have been founded upon the theory of a joint knowledge of the pertinent customary law. The birth of the definite notion of customary law as of inherently binding force, must, however, be placed in the time of the aristocracies.[2]

Besides the idea of law as exhibited in judgments divinely dictated, there was in Homeric times the beginning of the metaphysical notion of law as representing abstract justice or morality. This conception, in an embryonic state, was expressed in the word δίκη. In its original meaning, δίκη was the declaration of that which was θέμις, or ordained by Heaven; but in its secondary and derived sense it was employed as meaning justice.[3] The divine element was still conspicuously present, however, δίκη figuring both in Homer and Hesiod as a goddess. In the later Hesiodic poems, we find δίκη used in still another sense as meaning

[1] Bk. III, p. 84, Bohn's ed.

[2] Cf. Greenidge, *Greek Constitutional History*, p. 17, and Fanta, *Der Staat in der Ilias und Odyssee*, pp. 82 ff.

[3] Cf. Clark, *Practical Jurisprudence*, p. 51.

custom or usage.[1] It is to be observed, however, that these rules of customary usage, to which *dike* was applied, were still conceived to have a binding force upon men, not because they were rules which had been followed from early or immemorial times, but primarily because they were held to be in accordance with divine desire. Only secondarily were they accepted because of their supposed essential rationality and justice. Here, then, may be seen what may be called the metaphysical idea — the idea of the essential rightness — struggling to appear. The theological element is not ousted, but the idea of abstract justice as the source of the law's binding force is distinctly present. Moreover, the part played by man himself in the creation of order is much more pronounced than it is in the themistes. The actual source of the *dike* is in the practice of men. Proximately, then, at least, these laws were conceived to have a human origin.

The purely secular idea of law is for the first time shadowed forth in Greek thought in the word *nomos*. The earliest meaning of this word is in some doubt. It does not occur in Homer, but is frequently met with in Hesiod and Pindar, where it seems to have had the sense of a way or mode of life, a usage or rule. Also, as Clark points out, Pindar sometimes uses the word in connection with the name of races and countries, as indicating institutions and constitutions.[2] "To Pindar," Clark continues, "is due that spirited fragment extolling *νόμος* as 'king of all.' . . . Plato certainly, and Herodotus as certainly, understood Pindar here to mean by *νόμος* custom or conventional usage, certainly not positive enactment. I believe that in this fragment is already broached the philosophical opposition between natural and conventional justice, which Pindar, doubtless in the interest of some high-handed patron, denies : —

[1] Cf. Clark, *op. cit.*, p. 49. "Only in the comparatively late Shield of Hercules do we find *δίκη* approximating to the sense of custom."

[2] *Op. cit.*, p. 52.

"'(Custom and nature are not twain)
Custom, the lord of all, on high,
O'er gods and men doth strongly reign
And might for right doth justify.
Heracles' doings in proof I call —
No leave he asked, no price he gave,
But Geryon's cows away he drave
Unto Eurystheus' giant hall.'"

Thus, in general, in all the older writings *nomos* had this sense of secular law, but secular law of customary rather than of statutory or political origin. It was not until a comparatively late period that the word came to approximate in meaning to law in the modern positive or statutory sense. For, as we shall see, the Greeks only to a comparatively slight extent looked upon the state as itself a source of law. Even when uttered by the state the ultimate ground of a law's validity was almost uniformly conceived to be either in its consonance with the will of the gods or in the essential rationality of the principle stated by it.

With the downfall of the monarchies, the aristocracies came into power. To a certain extent, the ruling nobles claimed a divine descent, and thus a divine authority for their power.[1] The theocratic element was, however, by no means conspicuous or politically important. The aristocrats had no exclusive control over religion, and from the very nature of the case were not able to claim in the field of civil matters that divine inspiration for their judgments which the kings had been able to assert. They alone, however, were recognised to be possessed of a knowledge of the customary or unwritten law, and it was the abuse of the power which this fact gave to them that led to a demand for the popularisation of the knowledge of the law and for a reduction of its provisions to definite terms.

[1] Thus, for example, the claim of Hecalæus that his sixteenth ancestor was a god, was probably but typical of current Greek thought.

Thus was ushered in the era of codes. The Spartans, it was generally believed throughout Greece, had received their fundamental laws from Lycurgus, who in turn had got them, some said from Crete, others declared, directly from the god Apollo.[1] Herodotus, after saying that the Lacedæmonians were at an earlier period the worst governed people in Greece, gives the following account of the manner in which Lycurgus obtained the laws which he gave to them. "Lycurgus, a man of distinction among the Spartans, had gone to Delphi to visit an oracle. Scarcely had he entered into the inner fane when the Pythoness exclaimed aloud: —

> "'Oh thou great Lycurgus, thou comest to my beautiful dwelling,
> Dear to Jove, and to all who sit in the halls of Olympus
> Whether to hail thee a god, I know not, or only a mortal. —
> But my hope is strong that a god thou wilt prove, Lycurgus.'

Some report, besides, that the Pythoness delivered to him the entire system of laws which are still known by the Spartans. The Lacedæmonians, however, assert that Lycurgus, when he was guardian of his nephew Labotas, king of Sparta, and regent in his room, introduced them from Crete; for as soon as he became regent, he altered the whole of the existing customs, substituting new ones, which he took care should be observed by all. After this he arranged whatever appertained to war, establishing the Enomotiæ, Triacades, and Syssitia, besides which he instituted the senate, and the ephoralty. Such was the way in which the Lacedæmonians became a well-governed people. . . . On the death of Lycurgus they built him a

[1] The laws of Crete, as established by the mythical Minos, were held to have been divinely given. "'Do you believe as Homer says,' asks the Athenian of the Cretan Cleinias, in Plato's *Laws* (I *init.*) 'that Minos went every ninth year to converse with Zeus and made laws for your cities in accordance with his sacred words?' 'Yes, that is our tradition,' Cleinias answered."

temple, and ever since have worshipped him with the utmost reverence."[1]

These laws were never reduced to writing, and indeed a rhetra expressly forbade it. Moreover, they were almost wholly public in character. All private rights were to be decided by the ephors, and for these decisions, as Plutarch tells us, Lycurgus did "not prescribe any positive rule or inviolable usage, being willing that their manner and form should be altered according to the circumstances of time and determination of men of sound judgment." This was, of course, exactly the opposite of the policy laid down for the preservation of the constitutional laws. In them no change was contemplated, and therefore no legislative authority provided for their amendment.

According to some authorities these laws of Lycurgus were conceived of as contracts or covenants between the citizens of Sparta and their kings. Xenophon in his account of the Lacedæmonian institutions so describes them, and refers especially to the monthly oath mutually taken by the kings and ephors, the kings promising obedience to the existing ordinances, and the ephors engaging the obedience of the city so long as he did so.[2] The probability is, however, that while the Lycurgan legislation may have been rendered possible by an agreement between the different political parties of the time, the laws themselves were not regarded as contracts.[3]

[1] Rawlinson's transl., Vol. I, pp. 65, 66. As a matter of fact, Lycurgus was of course a mythological personage.

[2] *Resp. Lac.* 15; 1, 7. Cf. Greenidge, *Greek Constitutional History*, p. 92.

[3] Upon this point Schömann writes: "The laws of Lycurgus were called Rhetræ (ῥῆτραι. ῥᾶτραι ϝρᾶτραι), not in all probability, as some have thought, to signify their origin in the utterances of the gods, but because this name was universally used of those ordinances which were expressed in fixed and definite forms like the Latin word *lex*. Meanwhile in modern times the conjecture has been put forward by some that the name properly signifies a contract, and that the rhetræ of Lycurgus were so called because they contained certain resolutions concerning which the kings and the people had, through the mediation of Lycurgus, come to some common

The Spartans clearly distinguished these fundamental constitutional principles, which they came to ascribe to Lycurgus, from those which they established from time to time through their ordinary governmental organs.

The first Athenian code was that of Draco, given (*circa*) 621 B.C. In 594 B.C. this was amended and supplemented by the code of Solon. So far as we know, Draco codified only the criminal law. Solon's code was civil and political as well as criminal. Upon the criminal side, it retained the laws of homicide with little or no change, but in the case of other offences, as, for example, theft, the punishments, when deemed too severe, were softened. Upon the civil side, its provisions were probably largely drawn from an amended code of the thesmothetæ, which had been originally drawn up before the time of Draco. That distinction between these two bodies of law, however, which is of the most significance in the history of the development of the idea of law in the Greek mind, is the lessening in importance of the theocratic element in the later code. It is a necessary inference from the great awe and reverence in which Draco was afterward held that his code, if not traced directly to a divine source, was at least regarded as drafted under divine guidance. In the case of Solon's laws, however, it is quite evident that no special divine inspiration was claimed for them. It is true that it was reported that Solon received encour-

agreement or contract. It is, of course, self-evident that no such legislation could possibly have come about without some contract or understanding between the different parties, and actual mention is made in Plutarch's Biography of negotiations with the most influential men, of the regard which the legislator was forced to have to the voice of the citizens, which was not in agreement with his views, and even of resistance, which was only with difficulty overcome, to one of his most important ordinances. Generally, however, the legislation of Lycurgus was regarded by the ancients as one introduced under divine authority by means of the utterances of the Delphic oracle, while even the name rhetra was understood to imply a divine decision." *Antiquities of Greece*, Eng. transl., Vol. I, p. 222. This idea of rhetræ as laws divinely dictated, it may be observed, is found subsisting throughout the entire history of the Lacedæmonians.

agement from Apollo to undertake the task, and that he put his laws under the protection of Zeus, yet both in form and substance his code was conceived to be the product of his own brain, its provisions being such as his own wisdom suggested. Ideal perfection was not claimed for them. They were admitted by their author to be only as good as the people were then qualified to receive. The attempt was not even made to give finality to them, a definite time being set after which they should be subject to revision.[1]

According to Leist the Spartans were the first people of antiquity to secularise their idea of law by ascribing its creation to the deliberate choice or long-continued usage of man.[2] There is, however, no evidence whatever to support this view, and, on the other hand, there is abundant reason for granting this honour to the Athenians. While, as we have seen, Sparta kept her laws in unwritten form, Athens reduced hers to written form. By so doing it was inevitable that the part played by men in the creation of law should be made more explicit, and thus their secular character made more manifest. Also, there was thus necessarily presented the distinction between positive laws and unwritten customary or traditional rules of conduct.

Though thus, as has been shown, the Greeks, and especially the Ionians, gradually excluded the purely theocratic idea from their juristic thought, and in its place emphasised the human element, they did not arrive at that wholly secular conception of civil law which is held in

[1] According to Plutarch and Aristotle, they were to be binding for one hundred years. In his poems, however, Solon puts the period at ten years.

[2] "Die spartanische Rechtsordnung hat hierdurch zuerst im Alterthum, in einer seitdem für die ganze civilisirte Welt fortwirkenden Weise den Begriff des Gewohnheitsrechtes zur Geltung gebracht." *Graeco-Italische Rechtsgeschichte*, p. 545.

See also Lee, *Historical Jurisprudence*, pp. 167–168, where the dictum of Leist is accepted.

modern times. By them the general principles guiding and controlling the conduct of individuals living in social and political groups never came to be viewed as rules that fully admitted of formal statutory creation and statement at the will of a politically legislative body. Special administrative ordinances and decrees which they termed *psephismata*, the ecclesia might freely enact, but for the amendment of the existing *nomoi* a quite different procedure was laid down. This difference in procedure was not simply a formal one, but one that was required by the sharp distinction in very nature which the Greeks drew between general, permanent norms of civil conduct and special judgments or decrees.

According to the Athenian idea, the existing general laws recognised by the citizens and enforced by the state, were founded in reason itself. They were the rules of life absolutely demanded by the needs of the social whole. Their existence and their content were therefore conceived as matters not of choice, either to the individual or to the state. As expressions of absolute rationality and social requirement, obedience to their commands became a moral obligation which no individual might repudiate. Resistance to the law was thus not simply a civil crime, an offence against the political power, but an irrational, unworthy, almost sinful act.[1] By this it is not meant to

[1] Hermann in his Essay *Ueber Gesetz, Gesetzgebung und gesetzgebende Gewalt im griechischen Alterthume* (*Abhandlungen der historisch-philologischen Classe der königlichen Gesellschaft der Wissenschaften zu Göttingen, Vierter Band* 1848–1850), brings out with especial clearness this Greek idea. He writes: "Mit andern Wörten das Gesetz ist ihm nicht bloss ein Gewand, das er nach Belieben an- und ablegen kann und dessen Dauer nur davon abhängt, ob sein Inhaber mehr oder minder veränderungs- und modesüchtig ist; sondern es ist ein Stück seines eigenen Leibes, ein organisch mit ihm verwachsenes Gebilde, dessen er sich zwar nach Umständen sich entledigen darf, um es mittelst seiner politischen Reproductionskraft durch ein anderes zu ersetzen, das aber gleichwohl die höchste Schonung verlangt, um jene Kraft selbst sich missbräuchlich zu verschwenden, und jedenfalls schon durch sein Dasein den Menschen ungleich abhängiger von sich macht als es von seinem Willen ist" (p. 31).

be asserted that the idea of a material punishment by the state in the case of violations of the law by individuals played no part. The idea of physical penalties was often present to reinforce, when necessary, the sanction of reason and the dictates of justice. But it still remained true that it was the inner reverence for the law rather than outer fear of its penalties that furnished the real effective basis for the legal obedience of the Athenian.[1]

This conception of the law as spontaneously voicing, as it were, the will of the state, and expressing its inherent needs, caused the Greeks to look upon their laws not only as an absolutely complete whole, but as an organic unity, the particular parts of which existed as inseparable integral members. From this fundamental assumption important practical conclusions were drawn. In the first place, because viewed as a complete organic whole, the law was considered to need practically no additions, and, under ordinary conditions, few amendments. Because they conceived that they already had a complete body of the general principles rationally demanded by the special characteristics and needs of their state, they did not see the necessity for maintaining a continuously acting legislative body. They believed that legal changes were necessary only when the general character of their polity was so altered as to shift the balance of powers in the state or to modify radically the general character of the mode of life of the citizens. In such cases, legislation, though recognised as needed, was always thought of as being in amendment of, and never as creative of additions to, existing law. Thus it was specifically provided that

[1] "Das Gesetz ist nur der Ausdruck der sittlichen Idee des Volkes selbst, sein bürgerliches Dogma, dem er nicht untreu werden kann, ohne sich selbst zu verrathen, und dessen höchste Berechtigung mithin gerade in der Thatsächlichkeit liegt, mit welcher es aus dem lebendigen Organismus des Volkes hervorgegangen ist" (p. 33).

This paper of Hermann's is a very noteworthy contribution to the history of Greek juristic thought, and from it not a little of the substance of the immediately following paragraphs has been derived.

no new law might be enacted unless, at the same time, the law which it was to replace was repealed.

Moreover, the amendment of existing laws was a very serious matter; for each law being held to be intimately connected with the whole body of laws, a change or repeal of any one of them appeared as a disturbance of the entire legal body, and as necessitating a modification in the general polity of the state.

The effect of these views when put into practice is seen in the peculiar legislative system devised by the Athenians — a system which limited the legislative powers of the popular ecclesia to the enactment of administrative decrees and ordinances, and placed the final power of sanctioning changes of general laws in the hands of specially selected nomothetæ, each bound by oath to consent to no laws inconsistent with the fundamental principles of the Athenian state.

A direct corollary from this doctrine that, normally, no changes in general laws were needed, was the theory that the highest function of the state was the judicial. In our own time, as well, indeed, as was the case in Rome, the administration of justice involves, in theory at least, a mere act of judgment, the ascertainment by proof of facts, and the application to them of the appropriate principles which the law-making power of the state has already established. In Greece, however, the rendition of a judgment appeared as practically a declaration of the law itself. The courts appeared as the very mouthpieces of the laws. Their members bound themselves by oath to do justice according to the generally recognised principles of right, but they were controlled in their decisions by no doctrine of precedents. Each case was decided upon its own merits, as determined by the judgment of the members of the particular court, without reference to what might have been the decisions previously given in similar cases. No need was therefore felt for trained lawyers to instruct the court as to what was the law. The result of this was

of course, to place in the courts not only the administration of the law, but, within the broad limits of reason and justice, the power to declare the very content of the law. It was thus but natural that the complete popularisation of the law-courts should have marked the final step in the democratisation of the Athenian state. Sitting in the heliæa, with the attendance of the poorest citizens rendered possible by the provision of payments for attendance, the people of Athens controlled both the law and the executive officials that administered it. They did not possess this supreme power because, as in Rome, sovereignty was held to be vested in them: they became sovereign because they had this authority.[1]

Summarising then what has gone before, it may be said that though both the Dorians and Ionians broke away from the idea that all law is a product of the will of the gods, neither of these peoples arrived at that conception which gives to a people a full control of the constitutional and other juridical principles by which they were governed. Both in Sparta and Athens there persisted the idea that all general laws were of such a fundamental and imperishable character as not ordinarily to be subject to change at the will of the people. It cannot be said, therefore, that the Greek populace, however democratically organised, came to as full a conception of its sovereign powers as have the electorates of modern states.[2]

[1] Cf. Hermann, *Ueber Gesetz, Gesetzgebung und gesetzgebende Gewalt*, p. 76.

Even the enactment of *nomoi* by the nomothetæ took the form of a judicial procedure. Specially appointed advocates (*συνήγοροι*) defended the old laws, the amendment of which was proposed, and in similar manner the merits of suggested new laws were argued. There was thus in each instance a veritable trial between the old and the new.

[2] This statement seems to the author substantially correct. It may be proper, however, to give the following comment upon it which a very competent critic has made: "You are certainly wrong in the view that the Athenian *nomos* was not based essentially on the will of the people. The new nomos, it is true, was framed by the *nomothetæ;* but this body was really a legislative commission composed of members of the ecclesia, who

With the rise of the philosophic schools, increased attention was given to the idea of law in its metaphysical and moral sense, as embodying rules of abstract justice. In the sixth century the rationalistic Hellenic mind became dissatisfied with the idea that men and the world in which they lived were subject to the casual caprices of anthropomorphic deities. Then began the search for some fundamental principle or principles which should give order to men's lives, and stability and logical unity to their universe. In this search outside of mythology and theology for the meaning and essential nature of things, metaphysics was born. With the birth of this new

at the same time were sworn dikasts. The requirement that the commission should be members of the body of jurors for the year is merely a mode of fixing their qualification. It is also pretty certain that in deliberating on a proposed *nomos* the probouleutic senate of five hundred coöperated with the *nomothetæ;* and this seems probable also from the fact that the *nomos* could be attacked through the procedure called *graphe paranomon* before the heliastic courts. Moreover, if it be objected that the dikasts acted in the *nomothetæ* as jurors and not as mere members of the assembly, it may be noted as an interesting fact that the sources show that the orators addressed the dikasts as if they were the whole body of the citizens. Again, in later times, more and more of the legislation was done by *psephismata.* Psephismata covered nearly all departments of law-making. As a matter of fact, a thorough study of the legislative system of Athens will show that it was remarkably modern in spirit."

In reply to this it may be said that while it may be that in later times legislation was in very large measure by *psephismata*, it yet remains true that this procedure was strongly condemned by the thinking men of the time as in violation of a fundamental principle of Hellenic polity. It would carry us beyond the scope of this work to attempt an explanation of the very complicated legislative procedure of the Athenian state. It will be sufficient to say, however, that while amendment of existing laws was, of course, not rendered absolutely impossible, there nevertheless was not provided any one legislative organ that, strictly speaking, had the sovereign power of enacting law immediately binding upon the people. The *nomothetæ* who had the final ratifying power as to proposed changes in the law were sworn to consent to no laws inconsistent with the fundamental ethical and political principles after which the Athenian state was conceived to be founded, so that thus, in last resort, those deep, underlying, unchangeable laws of right and reason and not the commands of the state were regarded as exercising the real sovereignty over the individual.

attitude of mind the true Greek conception of the nature of law, and of the source of its binding force in natural right, began to appear. Then commenced clearly to emerge the characteristic Hellenic idea of Nature as the source of law, and Reason as the means through which Nature's wishes were to be discovered. Also, the distinction began to be more clearly drawn between law in its abstract, universal, and everlasting aspect, and law in its concrete, particular forms. The idea of conventional right separated itself from natural right, and with this came a clearer appreciation of the difference between law and morality.

In the development of these ideas at Athens, the fact that many of the laws had been reduced to writing greatly assisted. From now on we constantly hear of the unwritten law as distinct from the written, the former coming in time to be considered as nearly synonymous with natural or universal law, and as furnishing the sanctions and the precepts which received special application in the latter. It is thus to be observed that the distinction made by the Greeks between written and unwritten laws is not identical with that which we ordinarily make. In our case the line of division corresponds very closely to that which separates customary or common law from statutory law. To the Greeks, however, this distinction between custom and statute never became of such importance. When, therefore, they separated the written from the unwritten law the idea which they (the philosophical writers, at least) had in mind, beyond that of mere form, was the fundamental difference between temporary, local, empirical, concrete rules of conduct, and universal, immutable, abstract principles of natural justice.

Having brought the history of the development of the Greek idea of law thus far, we may leave its further growth to appear in the accounts to be given of the political views of the several schools into which Greek philosophy became divided.

The Greek Conception of the Nature of the State, and of its Right to Be

It will be remembered that, as has been already pointed out in an earlier part of this chapter, the Greek's religious beliefs were naturalistic, and yet of such a character as to exclude that sense of subjection to external objective powers which operated in so deadening a way upon Oriental thought. This distinction between Greek and Oriental thought is discernible in the very earliest of the periods of Hellenic history, but it is one which only came to clear perfection in later times. It was only as the idea of law as directly dictated by the gods was gradually supplanted by the abstract conception of justice and order as based upon principles determined by the very nature of things and ascertainable by right reason—it was only when this transition had been affected, that the Greeks were able to develop a theory of law and civil society in which the principle of obedience and order found complete satisfaction without a substantial sacrifice of individual freedom and independence.

The moral and religious philosophy of the Greeks being naturalistic, men's rights and duties were to be determined, it was taught, by the intentions of that Nature whose children they were. But how were the desires of this universal parent to be learned? Obviously, it appeared to them, by the special and peculiar characteristics, the particular aptitudes, desires, and possibilities of themselves as human beings. Nature was thus always conceived as acting teleologically, as working ever with a definite end in view. If then, the Greeks taught, it should appear that men were gifted with certain powers, provided with special desires, and endowed with definite potentialities of development, it was plain that it was a duty upon their part to use those powers rationally, to satisfy their proper desires, and, as nearly as possible, to realise the possibilities of growth which they possessed. Corre-

sponding to the duties thus generally indicated, it was plain to them that men might properly claim from one another and from society and the state such rights and opportunities as were necessary for their fulfilment. In fine, then, it was held by the Greeks, as her greatest philosopher expressed it, that it was the duty of men, because they were gifted with reason and endowed with potentialities for moral and spiritual growth, not simply to live, but to live well; not simply to exist, but to make their conduct accord as nearly as possible with the highest ideals which their reason could suggest.

Following out this line of thought, the Greeks clearly saw that a social and political life was a *conditio sine qua non* for securing to men that good life which their nature marked out for them. As in later times Aristotle declared, they recognised that to be able to do without society man must be either a god or a brute. It was in this sense that man was declared to be by nature a social being — a political animal. Societies and states, because necessary for man's well-being, were regarded as clearly intended by Nature, and therefore as much her product as was man himself.

Having accepted this idea as practically self-evident, it did not, and, in fact, until the rise of sophistic scepticism it could not, occur to the Greeks to seek further for a justification for the state's right to be. The state was not conceived of as having an existence outside of, or independent of, the lives of the citizens, much less as ever having interests contrary to theirs. Rather, it was regarded as a living social whole, in whose life each individual participated, and in and through whose glories and perfections he was able to employ his faculties, to develop his inherent powers, and to satisfy his highest spiritual desires. Through it he found himself brought into harmony and unity with his fellow-beings, his individual will purged of selfishness, and his life broadened and enriched by a life which, by the variety of its interests, and the dignity of its aim, both stimulated in him the worthiest of desires

and provided the means for their realisation. As thus conceived, a political existence, as the highest possible form of human life, came to have in the eyes of the Greeks an absolute value. Instead of being viewed as a mechanism, the state was regarded as a living organic whole. To it was ascribed, in effect if not in theory, an existence and interests of its own. It became indeed in their thought a sort of universal person absorbing in its life all individual personalities. Thus to them it appeared in many ways to have a higher and more perfect individuality and personality than did its citizens, for from its personality and from its life the citizen was supposed to derive all that was valuable to him as a man. It was in this sense that, as we shall later see, Aristotle declared the state to be logically prior to the individual, just as the whole is prior to its parts.

This apotheosis of the state was carried to such a degree that the doctrine of immortality, so far as it was developed by the Greeks, was often applied rather to the life of the state than to that of the individual man. It is this fact which in a measure explains why it is that, notwithstanding the high development reached by philosophy among the Greeks, there was, comparatively speaking, so little discussion concerning the possibility, or probable conditions, of an individual life hereafter for men. The state's life was conceived as eternal, and man's highest duty held to consist in the contribution of what lay within his power to the rendering of that life as glorious as possible. The problems of a life after death, and of the nature and probable immortality of the soul, were more or less discussed by the Greek philosophers, as, for example, especially by Plato in his *Phædo*, and in the tenth book of his *Republic;* but nowhere do we find the definite statement of a view according to which an existence after death is one to be looked forward to with pleasurable anticipation and in which the individual man retains his personal identity. The soul is often spoken of as an

immortal essence, and a region is pictured in which the shades of departed ones wander about apparently leading a cheerless existence. But even Plato who teaches in his *Republic* that the good and bad deeds of this life have an influence beyond the grave, does not positively assert a continued personal consciousness or even a personal existence. Nowhere does he speak dogmatically. The most that he can be held to have asserted is that death is to be faced with courage, and that if there be a life hereafter it will be well for the noble soul, and if not, then at least nothing worse is in store than "a state of nothingness or utter forgetfulness." At any rate neither Plato nor any of the other philosophers taught a doctrine of a life to come of such a character as to lessen in any degree the importance of the social and political obligations of this world.

The foregoing serves to explain the apparent paradox that the Hellenes, while recognising in the clearest manner the independent value of the individual as a moral being, were yet able in their political philosophy to harmonise that idea with the rightful subjection of the citizen to the absolute control of the state. The individual was in many respects more completely subordinated to the control of the state in the Hellenic world, than were the subjects of the Asiatic monarchies. There was, however, this fundamental difference between the two: While the Oriental in his subjection to the law and to the state viewed his subordination as an obedience rendered to an alien and external power, the Greek saw in it but the yielding to a higher self, a giving up of his will to a will in the formation of which he participated. What in the Oriental world was political slavery, thus became in the Greek world self-surrender. Instead of being viewed as something alien or antagonistic to himself, the state was regarded by the Greek as a being of which he constituted a part, and in whose life he participated. Life in a political society with all its conventions and demands meant to

him not an interference with an original independence, but a condition of life in which alone he was able to live the life of a rational moral being.

With such a conception as this, it was hardly possible that the Greek should feel in any degree a sense of subjection in yielding to the state the control of his conduct, and in surrendering his will to the demands of its laws.

Newman, in his *Politics of Aristotle*,[1] speaking of the Greek conception of the state and of law, says that the philosophers, Plato and Aristotle in particular, sought to make of the city-state an oracle of spiritual truth, to provide every man with a kind of parochial Sinai. This is, however, rather an overstatement. The Greeks looked upon obedience to the state as an absolute duty. They regarded its laws as absolutely binding upon them, but they never sought their final sanction in the command of the state. That sanction they found in their rationality, their consonance with the dictates of right reason, and their adaptation to the true needs of men. The laws might find expression and enforcement in the state, but as embodying principles of abstract justice, they were conceived as binding, *ex proprio vigore*, upon all men as rational and moral beings.[2]

[1] Vol. I, pp. 81–82.

[2] "He [the Greek] did not fall back on the theory of a personal sovereign; to him laws are enforced by, but are in no sense the product of, a government; he only faintly appealed to the gods, and, while giving law a divine character, rarely, in the historical period, gave it a directly divine origin. The charge that Greek law lacked an authoritative character, is, therefore, not unnatural, but it is wrongly stated when it is implied that the Greek looked on his state as an 'oracle of spiritual truth,' as a 'parochial Sinai,' as a pope who could be 'ecumenical.' It is true that spiritual life based on divine authority is not an idea wholly unknown to the Greeks. We find the idea in acts such as the purification of Athens by Epimenides, in ceremonies such as the Eleusinian mysteries, celebrated by a privileged race which has received its authority from God. The laws of Minos have a divine origin; all those of Sparta are Πυθόχρηστοι νόμοι. But nowhere is the state the sanction. To the Greek mind generally the only authority on which revelation rests is the authority of nature and reason. Plato embodies this doctrine when he would have his laws

Though the Greeks thus believed in what amounted to an idea of almost absolute obedience to the laws of their states, this did not prevent them from exercising their reason as to what were the best laws, and from testing particular laws by the criteria thus determined. While in ultimate origin the state was regarded as divine, or, what was the same thing to them, the product of Nature itself, it was recognised that in its form of organisation and manner of administration it was an institution subject to men's direction and control. There was, in fact, no trace in the political philosophy of the Greeks of that feeling which prevailed in the East that whatever is is right, and that it is impious to doubt whether the existing condition of affairs is the best condition possible. In other words the Greeks, though they saw in the state an institution that sprang from human instincts and needs, exactly as did the family, and for that reason did not seek further for the ultimate prerogative for its coercing power, they did conceive it to lie within the province of philosophic thought to determine the manner in which, and the extent to which, this right of compulsion might properly be used. They were thus led to construct ideal polities as the crowning point of their philosophies. From the very early times governments were classified by the Greeks not only according to their forms of organisation, but according to their degrees of merit. In the third book

couched in persuasive form, not merely command or threaten. In a sense every state was regarded by its citizens as 'ecumenical' — that is, as teaching and enforcing a doctrine which ought to be valid for all the world. This will become more apparent if we cull some definitions of law from two very different sources. Law has a divine origin as the 'discovery and gift of the gods'; it expresses human reason, and it is a 'covenant between man and man.' It is order, the passionless reason, the rule of God and of reason and derives its force from habit. Law is, therefore, a covenant between men dictated by divine reason; it is the fixing of the best custom or habit in generalised form; it comprises those rules of life which ought to have absolute validity; and, as comprising them, it may be, and ought to be, itself sovereign." Greenidge, *Handbook of Greek Constitutional History*, p. 9.

of Herodotus we find monarchy, aristocracy, and democracy clearly distinguished, and their relative excellencies and defects quite fully discussed. This discussion is placed in the mouths of the Persian conspirators, but the arguments used are obviously Hellenic. From this passage, even were there not abundant other evidence, it is quite evident that in the fifth century B.C. the Greeks had already entered upon "the age of discussion." As further illustrating the rational way in which the Greeks viewed their governments, we find in the next century the following, taken from the Pythagorean "Fragments" of Archytas: "There are divine laws — the unwritten laws of the gods and the written laws of men. It is by law that the king is legitimised. Where the law is violated, he is nothing more than a tyrant. The right of command belongs to the best. According to some this is in an aristocracy, others in a democracy, others in an oligarchy. But that founded upon aristocracy is the best, for in that the proper proportions are observed; [here of course appears the mathematical basis of Pythagoreanism,] *i.e.* the greater terms have the greater influence, and the little terms the lesser influence. Democracy, on the other hand, is founded upon geometric proportion, in which the relations of greater and lesser terms are made equal; while the oligarchy and tyranny are founded on arithmetical proportion in which the lesser terms have the greater influence and vice versa."

One logical consequence which followed from the relation in which the individual was conceived by the Greeks to stand toward the state, was that the legitimate functions of the political power were held to be limited only by their potency for good. The state's end being the all-comprehensive one of securing a "good life" for its citizens, all activities and all forms of control calculated to secure that result were held proper. Thus in fact the Greeks never made a clear distinction between the just limits of social control and the legitimate authority of

the political power. The Greeks had in truth no words to distinguish between the conceptions of "society" and "state." As regards the control of the citizen in his conduct, no line was drawn between matters political, moral, religious, or economic. The state might control or forbid foreign trade, prescribe occupations, regulate amusements. Plato did not go counter to general Greek ideas as to what was proper when he proposed that the state should determine what books should be read, what songs sung, and what dramas played.[1]

In such a political philosophy as this the idea that the state existed solely, or even chiefly, for the protection of the private rights of its citizens of course found no place. Rather it was held that without the state the individual would have no rights at all — not even natural or moral rights, for without the education and order which the state affords he would have neither the disposition nor the opportunity to lead a moral, rational life.[2]

A further consequence which followed from this extended idea as to the scope of the state, was to make of politics and ethics practically one science. As we shall later see, in the writings of Plato the two were completely identified. Aristotle distinguished between them, but in conformity with the principles which we have been stating,

[1] "It was not so much that the State interfered in almost everything, but rather that everything was absorbed in the State. Religion was the State's religion, and any one who announced new gods, had to drain the fatal cup. The family was only a means to the end of the State. The State might prevent trade and traffic with foreign countries, and fetter the full activity of the economy of individuals; it acknowledged no society but itself. That State was only the logical consequence of the same political idea which prescribed to music its melodies, to instruments their tunes, and even ventured to forbid the Hellenes to read Homer." Felix Dahn in Lalor's *Cycl. Pol. Sci.*, art. "Philosophy of Law."

[2] In all of the foregoing, we are speaking, of course, of the more enlightened of the Greeks. It is very likely the case that what appeared to the philosopher as a law of Nature, seemed to the uneducated as either a divine fiat or an arbitrary political command. But there were very few uneducated Athenians of full citizenship.

made politics the master science, with ethics one of its subdivisions. Thus he explicitly declares his *Nicomachean Ethics* to be a political treatise, and to be but an introduction to his treatise on politics proper.[1]

Also connected with this exalted idea of the prerogatives of the state, was the failure of the Greeks to make a clear distinction between public or constitutional laws and the rules regulating matters of private concern.

In modern times we distinguish sharply between the ideas of state and government. By state we mean the body politic abstractly considered, the entity which possesses and exercises the sovereign will. By government we mean the mechanism of political control, the *ensemble* of the agencies through which the tasks of the state are performed. All law which has to do directly with determining the form of government that shall exist and the extent of the powers to be severally distributed among its various organs, we term constitutional. All other laws which have to do primarily with the defining and the fixing of the modes of enforcement of the rights of property and other personal rights of individuals, we entitle private. Of this practice we find almost no trace among the Greeks. To them the constitution or *politeia*, meant merely the city or *polis* abstractly viewed. In this term was therefore summed up all social and political relations, public and private. Because the individual, in all that concerned him, stood in such an intimate relation toward his state, it did not seem necessary to denominate some of his interests private and others public. In the constitution of the state, therefore, it was supposed that the whole life of the people was summed up. No room was thus left for a separate and distinct code of public law. The nearest the Greeks came to a conception of constitutional law in the modern stricter sense of the word, was in the idea that in each state there had to exist certain laws peculiar to it whose character was determined by the form of gov-

[1] Bk. I, ch. II, and Bk. X, ch. IX.

ernment which existed, and whose function it was to protect that government against all dangers inherent in it. If the government were democratic, these laws should be so framed as to protect the people in their possession of the sovereign power. If monarchic, oligarchic, or aristocratic, they should have for their aim the preservation of the power of the monarch, the oligarchy, or aristocracy, as the case might be. Thus, as Greenidge says in his excellent manual: "Law in its relation to the constitution has clearly a protective character, and this agrees with the common Greek notion, so different from that which we gather from the philosophers, that law is prohibitive rather than positive. The general idea of Greek political organisation is that of a structure framed on a certain principle of life, with rules ordained to protect it, and to prevent its being destroyed. The constitution has the force of the community on its side, and this must be used by the magistrates to carry out the laws. While, therefore, by 'public law' we generally mean the actual constitutional arrangements of a country, the Greeks would have understood by it the protective measures by which the permanence of these arrangements is secured, and the Greek *νομοθέτης* is a creator before he is a legislator. The necessity of law to a constitution depends entirely on the idea of the imperfection of human nature, and on the probability of resistance by certain individuals or classes to the ideal set up by the state."[1]

In truth, the idea of formal civil law played a very insignificant part in the political thought of the Greek people. As we have already learned, the state was not looked upon as characteristically a law-making body, and changes in existing laws were discouraged. Indeed, the very suggestion of change was often made dangerous to the proposer. In our day, accustomed as we are to view the state as having functions legislative, judicial, and executive, of which the first is by no means the least

[1] *Op. cit.*, p. 9.

important, it is difficult to appreciate that among all peoples in their earlier periods of political development, the state was regarded as almost exclusively an organ for the execution of the law, not for its creation, and that the judicial function was considered, as indeed it really is, as but a step in the executive or administrative process. From the time of the aristocracies, the Athenians recognised that many civil laws at least were of human rather than divine origin, and therefore that they were subject to change. Solon, as we have already said, did not declare final the code promulgated by him. But there still hung around all *de facto* laws and institutions a sentiment of sanctity, which forbade all changes not absolutely necessary.

As both an evidence and a result of this disposition of the Athenians to seek outside of the state for the source of law, is the fact already adverted to, that it is with difficulty that one is able to find in the Athenian state any governmental organ definitely entitled to speak its sovereign legal will. The ecclesia was undoubtedly a sovereign administrative body, but it was scarcely a legislative assembly. It could issue administrative decrees, but could not rightfully of itself declare general laws. It could propose an act of legislation, but it had not the final say as its enactment. This final word had to be spoken by *νομοθέται*, who were appointed for the special purpose by the ecclesia. These *nomothetæ* varied in number from five hundred to a thousand. Changes in the existing laws might also be suggested by the *thesmothetæ* of the year, the acceptance or rejection of these proposals lying, as in the case of changes initiated in the ecclesia, with the *nomothetæ*.

Not only did the state not appear to the Greeks as the necessary source of private law, but it was not even regarded as having for its main end the enforcement of individual rights. That fundamental idea upon which the Romans erected their wonderful system of private

law — namely, that each individual is the "subject" or possessor of a variety of legal rights, which rights in the aggregate make up his legal personality, and that it is the special province of the state to define and protect these rights — found no place in Hellenic political thought. Thus the Greeks never developed the idea of civic freedom in the Roman or modern sense. To them freedom was, it will be remembered, a social rather than a legal idea. The citizen received his liberty only as an integral part of the political whole, not by virtue of any individual right. Even the idea of the civic equality of all citizens was not looked upon so much as a legal principle as a consequence, flowing from the fact that all were parts of the same whole.[1]

Not only this, the Greeks never seem to have introduced the maxim that judicial decisions should be guided by formal principles, and not by the apparent exigencies of each particular case. The decisions when rendered were accompanied by no reasons, and precedents never received any weight.[2] Lacking these elements, the Greeks necessarily failed to develop a scientific system of jurisprudence. Private rights, recognised and enforced by the laws, there were, of course, but never was there the thought of defining them with technical exactness, or of grouping them into general classes and of so relating them logically to one another as to make of them a consistent whole.

Greek Democracy

The Greek's conception of the state as an entity of which he was an integral part, and as a being in whose will he saw voiced his own will, enlightened and purged of selfish particularity, was one not so difficult for the

[1] Cf. Hermann, *Gesetz, Gesetzgebung u. gesetzgebende Gewalt*, p. 30. As Hermann says, there was between the citizens a *Gleichgewicht* rather than a *Gleichheit*.

[2] Cf. Holm, *Hist. Greece*, Vol. IV, p. 523.

Hellenes to realise as it would be to a modern. Because of the smallness of the ordinary Greek polis every citizen could, and in the latter democratic period did, take personally an active part in the administration of public affairs. That he was thus a part of the state, and that its life was a part of his life, was thus an obvious reality to him. Every Athenian citizen could sit in the ecclesia, and every one over thirty years of age in the law courts. In order that this right should be one that every one, poor and rich alike, might equally enjoy, a small payment for attendance at the meetings of the ecclesia as well as of the law courts was provided in the time of Pericles. In the ecclesia the citizen body heard debated, and by their votes decided, every question of public importance. In the courts they gave final judgment upon every question referred to them. Besides the ecclesia there was the large council of five hundred appointed every year, whose function it was to prepare all business for the ecclesia and to oversee the execution of its decrees. Then also there were all those officials who helped the council, — the archons, strategi, and other boards, ranging in number as high as thirty, having to deal with such matters as religion, education, ships, etc. Aristotle estimated that at about the middle of the fifth century these public functionaries aggregated fourteen hundred.[1] If to these we add the five hundred councillors, we have a total of nineteen hundred. When it is remembered that the total adult citizen population of Athens was scarcely more than thirty thousand, and that, with few exceptions the terms of service of all these officials were but one year, and reëlection not the rule, it will be seen that, aside from service in the ecclesia and law courts, it was quite probable that, sooner or later, every full Athenian citizen would be called upon to serve actively in the administrative branch of his government.

So essential to the very idea of a proper polity did the

[1] *Athenian Constitution*, c. 24. Cf. Fowler, *The City-State*, ch. VI.

Greeks consider the active participation of all citizens in public affairs, that a true state is ever conceived by them as extremely limited, territorially and in population. Thus, as is well known, the state is always pictured as a polis or city, in which the number of citizens is not so great but that they may all assemble in one place, and be personally acquainted with one another. It is true that the Athenian state comprised not only the people actually resident in the city, but all those living in Attic territory. But these latter were conceived of as having a political existence not as inhabitants of Attica, but as citizens of the polis Athens. Aristotle in his *Ethics* lays down as the utmost limits of a state that it should have more than ten and less than one hundred thousand citizens. This maximum is, however, one to which the average Greek city did not nearly approach. According to Ctesicles, a census of Attica taken under Demetrius Phalareus showed but twenty thousand full citizens.[1] When then to this smallness of size was joined the extensive character of the state's activities, an intensity of political life was produced which we of modern times can scarcely realise.

This "small-state" idea the Greeks never abandoned. The city as a political body sufficient in itself, and absolutely independent of control from outside power, ever remained to them the type of a true civic whole. When in later times the federal idea was forced upon them, it was viewed, as indeed it was, as politically a downward step.

[1] This of course excluded the metics, of whom were returned ten thousand, and slaves of whom there were over one hundred thousand.

CHAPTER V

THE SOPHISTS

Greek thought became scientific in the sixth century. By this time Hellenic political life had also reached a high degree of development. Distributed throughout the peninsula and upon the outlying colonised islands and neighbouring coasts, hundreds of civic centres existed, which exhibited in their public lives almost every variety of governmental organisation. Thus already there lay close at hand, upon every side, the richest of material for the stimulation of political inquiry and the determination of philosophical principles of statesmanship. Notwithstanding such favourable conditions, however, the Hellenic mind, active as it then was in cosmological speculations, did not at once turn its inquiries into political channels. Some general principles of statecraft are met with at this time, but no attempts at the searching out of abstract principles of public law.[1]

The chief reason for this dearth of political speculation of course lay in the fact that philosophy had just been born, and had not as yet had time to turn to the solution of political problems. Another fact, however, that may have had something to do with this, is that the prevailing form of government in Greece in the sixth century was tyranny, using tyranny in its Greek sense as indicating a form of rule not necessarily evil or oppressive, but contrary to law. However much the Tyrants may have

[1] "*So fehlt vor den Perserkriegen jede Staatswissenschaft. Es giebt nur populäre Regelsammlungen über öffentliche Dinge.*" Rehm, *Gesch. der Staatsrechtswissenschaft*, p. 5.

permitted and even encouraged other arts and speculative inquiries, they were obliged, because of the illegal basis of their rulership, to discourage, even if they did not dare directly to forbid, all too inquisitive political theorising. This fact is testified to by numerous laments which have come down to us in the scanty literature of the period. Nor was the condition of affairs in this respect much better under the few aristocracies which then existed.

Up to the time of Protagoras we may say that the vital question of political philosophy — that as to the right of the state to be — had not been fairly formulated in the Greek mind. The necessity for the existence of a political power had been taken for granted. Of an attempt to determine the moral ground of its authority, beyond the fact of its obvious value for protection from the outside, and the maintenance of order within, little or no trace is found. A general submission to religious demands and to current conceptions appears to have been unthinkingly yielded. In pure philosophy little more was done than to attempt the explanation of the phenomenal world in terms of some mystical principle or element that was assumed to be simple and original, with, as a result, the formulation of a number of crude and fantastic cosmologies.

Soon after the time of the so-called Pythagorean school, however, there came a crisis in Greek philosophy such as ever occurs when a critical examination upon a purely rationalistic basis is made of systems of thought and of social institutions which have hitherto depended upon a despotic, theocratic, or mystical foundation. Extending their inquiries from the world of matter to men as thinking, living beings, the Greek philosophers now began to work out in a speculative way the meaning of life, and to analyse men's relations to one another and to the cosmos in which they found themselves. Being thus led to an examination of existing social and political conditions,

they demanded of them an ethical *quo warranto*. Thus for the first time the question was raised whether there are canons of right and wrong which are fixed and determined for all times and all races by divine or natural sanctions, or whether all rules of conduct are established by, and amenable to change at the caprice of, men.

In order properly to understand the significance of this new phase of thought, and clearly to appreciate why it was that it should have taken its rise at the time that it did, it will be necessary to consider the new political conditions which characterised the period of Greek history immediately following the Persian wars.

During the fifth century political developments had proceeded with great rapidity at Athens. As a city, Athens had been greatly enlarged and surrounded by strong walls. As head of the Hellenic confederacy which had been formed for resistance to the Persians, her political importance had enormously increased. Her form of government had changed from an aristocracy to a democracy. All this had served to quicken the already alert intelligences of her citizens. Art, literature, and philosophy in all their forms flourished to a degree that has never been duplicated in the history of any other community. A single age rejoiced in the possession of an Æschylus, a Sophocles, and a Euripides, a Herodotus and a Thucydides, a Phidias, a Socrates, a Zeno, an Anaxagoras, a Protagoras.

But, together with this brilliancy of intellectual activity, elements had entered the political life at Athens which were antagonistic to the principles of her true civil life, and which threatened to destroy the national spirit which had rendered possible that magnificent civilisation which these Ionians had been able to secure. With political success had come political dangers; with the progress of democracy had come a deterioration of methods in civil administration and lack of wisdom and stability in the conduct of foreign affairs; with the development of philo-

sophical thought had come ideas that might easily be so interpreted as to be socially and ethically anarchistic. The extent to which these new ideas and new polity did, in fact, lead to a moral deterioration of the people of Athens, and to a lessening of patriotism, is a matter of dispute. The more generally held view is that the fifth and fourth centuries witnessed a marked decline, political and ethical, on the part of Athens. Thus Zeller writes: "With the culture and brilliancy of the epoch of Pericles, there went hand in hand an increasing relaxation of the ancient discipline and morality. The undisguised self-seeking of the greater states, their tyrannical conduct to the lesser, even their successes, undermined the public morals; the causeless internal feuds opened a wide field for hatred and revenge, for avarice, ambition, and all the passions; men accustomed themselves to the violation, first of public then of private rights, and the curse of all self-aggrandising polity was fulfilled in the most powerful cities, such as Athens, Sparta, and Syracuse; the recklessness with which the state trampled upon the rights of other states destroyed in its own citizens respect for right and law. And when individuals had sought their glory for a while in devotion to the ends of the common selfishness, they began to apply the same principle of egoism in an opposite direction, and to sacrifice the welfare of the state to their own interests.

"Moreover, as democracy in most of the states increasingly threw aside all the restraints of law, the most extravagant notions were formed concerning popular government; there grew up licentiousness which respected no custom or proprieties, and the perpetual alteration of the laws seemed to justify the opinion that they arose without internal necessity, merely from the whims, or the interests, of those temporarily in power.

"Finally, the advancing culture must itself have more and more removed the limits which were formally set by morality and religious faith to selfishness. The unquali-

fied admiration of home institutions, the presuppositions, so natural to a restricted stage of culture, that everything must be as we have been accustomed to see it at home, necessarily vanish before a wider knowledge of the world and of history, and a keener observation of mankind. For the man who had once accustomed himself to ask for reasons for everything, traditional usage lost its sanctity; and he who felt himself superior to the mass of the people in intelligence would not be inclined to venerate, in the resolutions of the ignorant multitude, an inviolable law. . . .

"Even art contributed to the undermining of faith. Plastic art, by its very perfection, made men recognise in the gods the work of the human mind, which in art actually proved that it was capable of creating from itself the divine ideal, and was free to control it.

"But still more dangerous for the traditional customs and religions must have been the development of poetry, and, above all, of the drama, the most effective and popular kind of poetry. The whole action of the drama, comic as well as tragic, is based upon the collision of duties and rights, of views and interests, upon the contradiction between traditional usage and natural laws, between faith and the speculations of reason, between the spirit of innovation and the predilection for what is old, between versatile cleverness and simple rectitude — in a word, upon the dialectic of moral relations and duties. . . . The whole speech was penetrated with a spirit of revolution and of progress, and none of the existing powers was in a position to exercise it.

"It was impossible that philosophy should not be infected with the spirit. Essential points of contact with it were already to be found in the system of the physicists. . . . When Parmenides and Heracleitus, Empedocles, Anaxagoras and Democritus with one accord distinguished between nature and traditional custom, between truth and human tradition, this distinction needed only to be applied

to the sphere of practice in order to maintain the Sophistical view of the positive element in morals and law. If several of these philosophies had expressed themselves with bitter contempt in regard to the senselessness and folly of mankind, the conclusion was not far to seek that the opinions and laws of this foolish multitude were not binding on the wise. In respect to religion this declaration had long since been made."[1]

As has been said, the foregoing quotation represents not only the declaration of an eminent Greek scholar, but the view most generally held regarding the condition of the Hellenic morals and politics of the times of which we are speaking. It would seem, however, that there are very good grounds for believing that the picture thus drawn is far too darkly shaded. Beyond all doubt there was during this period, upon the intellectual side, a most profound movement in progress which carried away with it many, if not most, of the old traditional moral principles. That there were dangerous elements as well as errors in these new doctrines it is certain. A period characterised by radical changes in currently accepted canons of conduct and belief is always a critical one, and needs the guiding and restraining influence of its wisest men, lest, with the casting away of old moorings, the people and the ship of state be carried too far by the flood of new ideas. Furthermore the establishment of the democratic régime in government had necessarily brought with it to Athens its own peculiar dangers and defects, the most conspicuous of which were a lessened regard for established constitutional principles and a division of the people into self-seeking, political factions. But these did not lead to a general impairment of the law-abiding spirit of the people of Attica, nor to a decline in the state's political power. This Holm makes very plain.[2] The evidence that he adduces cannot be reproduced here.

[1] *Pre-Socratic Philosophy*, Eng. transl., Vol. I, p. 401 *et seq.*

[2] See his *History of Greece*, Eng. transl., Vol. III, ch. XIII and notes.

It will be sufficient, however, to say that it is quite clearly shown that the final decline of Athens was due rather to bad leaders and to a defective foreign policy than to a general decline of virtue on the part of the people.

At this time the utmost freedom of speech and writing was permitted, and this of itself bears evidence, as Bury says, of the strength of the state. "Such license is never permitted in an age of decadence even under the shelter of religious usage. It can only prevail in a free country where men's belief in their own strength and virtue, in the excellence of their institutions and their ideals, is still true, deep, and fervent; then they can afford to laugh at themselves. The Old Comedy is a most telling witness of the greatness of Athens."[1]

One of the products of this intellectual freedom was a considerable literature on the art of government. But it was not alone the progress of democracy and the freedom of thought which were responsible for this. The very character of that thought made instruction in statecraft peculiarly necessary. In a democracy, the way to power is through an ability to win to one's self a popular following. Political argumentation thus becomes a necessity. The *demos* cannot, in general, formulate its own principles. It can only accept those framed by its leaders and supported by their plausible appeals to right or material interests. Eloquence and specious argument thus become the most important weapons in the statesman's armory. In the time of which we are speaking this was especially true. As we have already learned from the quotation from Zeller, the whole tendency of the philosophy of the period was toward an unsettling of convictions, a liberalising of the mind from the authority of traditional customs, a loosening of the individual from the absolute bonds of political laws and social conventions. The way was thus laid open for the free employment of those demagogic arts of which we have been speaking.

[1] *History of Greece*, Vol. I, p. 417 (ed. 1902).

At this time, also, political conditions had become much more complicated than they had formerly been. The activities of the state had become more numerous, the governmental machinery more intricate, the economic conditions less satisfactory. The old Athenian aristocracy had been founded upon slavery and land-ownership. Its members, released from the necessity of engaging in productive enterprises, had been free to devote their entire energies to matters of state. Opposed to them were a class of landless men, who, because of their economic condition, had no hope and therefore no disposition to contest with the wealthy for the control of the state. With the rise of foreign commerce, however, there had arisen a wealthy class engaged in trade, the members of which now sought political power. Here already, then, was an element of discord, — an old land-owning aristocracy, conservative and proud, and a new aristocracy engaged in trade, saturated with foreign ideas and disposed to innovation.

Under conditions such as these, it was but natural that there should arise a school of teachers who, from instruction in matters metaphysical and cosmological, should turn to the giving of lessons in politics or the art of government. Hence it was that the Sophists, who represented in their general philosophy the disintegrating thought of the time, made it their especial business to give to their followers instruction in eloquence, rhetoric, and argumentation, — in everything in fact that was calculated to assist one in securing power at the hands of the multitude and in keeping it when secured. The term *Sophist* was thus, as Grote has shown, rather the name of a profession than of a philosophic sect. The Sophists, or teachers of wisdom, as they called themselves, had indeed few common doctrines. That which especially characterised them was rather their methods and the general tendencies of their thought.[1]

[1] Cf. Ritchie, *Plato*, pp. 63–67.

The Sophists cynically avowed that they taught truth, not for its own sake, but as a means to an end. Indeed they pretty nearly taught that there was nothing absolutely and universally true, that there were no principles abstractly valid, no canons of conduct everywhere and under all circumstances binding. They recognised no distinction between the idea of right and the formal laws in which it might find itself embodied. Because they saw these forms differing at different times and among different peoples they rejected the idea that there are abstract principles of justice which are everywhere valid, and which furnish the moral basis for all those specific rules of conduct which are ethically defensible. Man, they said, is the measure of all things. Properly interpreted this might be true, but not as construed by the Sophists. By man they meant mankind as distributively viewed, not as universally conceived. That is, according to their view each individual, with all his accidental and peculiar desires and characteristics, was qualified, upon the basis of those desires and characteristics, to pass judgment upon what it was right and wrong for him to do. Instead, therefore, of seeking instruction from the deepest truths of philosophy, they declared that guidance is to be obtained wholly from an examination of the concrete conditions of time and place. Instead of being instructed to see principles of natural or universal right embodied in the civil laws and customary morality of his country, the citizen was taught to discover only particular decrees which were in the main the product of the selfish desires of those who had originally issued or sanctioned them. Such a theory as this was absolutely destructive to the principles upon which morality and justice were generally conceived to rest. Until then the accepted belief in the rationality of the universe, and of man as a member of it, had carried with it the moral idea that there were standards or principles by which all things were governed. The moral man was one who acted upon principle, who measured good

and evil by some standard of value, and who determined that standard by the end or good which he conceived it to be to his best welfare to realise. When, then, the Sophists sought to inculcate the doctrine that there were no fixed measures of conduct, they at once removed from morality its basis, and from philosophy that theory of the immanent rationality of Nature upon which so many of its conclusions had depended. Thus it is seen that the issue involved in the argument which Plato in his *Republic* conceives Socrates to have carried on with Thrasymachus was at once the most elementary and the most vital which scepticism could raise.[1]

Holding such a position as this the Sophists were necessarily led to declare superior strength to be the sole basis for a legitimate exercise of power. For if there were no universal principles of justice to be enforced, and if self-interest were to be the sole actuating motive in human conduct, political right necessarily rested upon a simple basis of might. The Sophists did not immediately come to this position. Prodikas and Protagoras, for example, attempted to avoid this conclusion; but for the majority this was the theoretical as well as the actual conclusion to which they were finally led by the logical force of their premises.

By nature, they taught, men are unequal in strength. The stronger have therefore a natural right to rule, or at least, there is no natural right of the weaker to protection against their more powerful fellows. The "natural state" is, therefore, one of war of all against all. This being so, the establishment of a political rule is necessarily due to a stratagem of war or to an agreement on the part of a number of individuals to unite their strengths for the control of the rest. In some cases, they taught, this may arise out of a union between the strong for the oppression of the weak; in other cases it may be due to a combination of the weak to render themselves secure against the tyranny of

[1] Cf. Nettleship, *Philosophical Lectures and Remains*, Vol. II, p. 39.

the strong. In either case, however, the state is given an artificial or conventional basis and founded upon self-interest. In effect, then, the Sophistic position was that men are naturally non-social, and that the state rests upon an individualistic foundation, and that all rulership, so far as it is rational, is essentially selfish in aim. The ideal ruler is the egoistic despot. "The apotheosis of tyranny in its worst sense is the final word of the Sophists' politics."[1]

The Sophists were thus the first individualists of history. In a very fundamental sense they may be regarded as the originators of the political compact theory. Describing their views, Aristotle tells us in his *Politics:* "For law is an agreement and a pledge, as the Sophist Lycophron says, between the citizens, of their intending to do justice to each other, though not sufficient to make all the citizens just and good."[2] The antithesis between Nature (*φύσις*) and law or convention (*νόμος*) is clearly drawn, justice being interpreted as founded wholly upon agreement, and supported wholly by force.

From the time of the Sophists we find clearly drawn in Greek thought the distinction between secular or civil laws and natural or universal principles of right. With this comes the beginning of a distinction between ethical obligations and political commands, between morality and legality. This distinction is often spoken of by them as one between written and unwritten law, but not quite correctly. The natural or universal law was always unwritten, but the civil law not always written. Before this time the Greeks must have seen the distinction between such principles of conduct as were generally binding because of their abstract justice and those special laws which were peculiar to each city. But these latter they had held to derive their validity from the former, and,

[1] Hildenbrand, *Geschichte und System der Rechts- und Staats-philosophie,* Vol. I, p. 78.

[2] Bk. III, ch. IX. Cf. views of Glaucus in Plato's *Republic.*

moreover, they had not conceived it proper for the individual, *quâ* individual, to question their rightfulness as applied to himself. Thus the distinction had not been a very important one. It was just at this point that the Sophists introduced their disintegrating principle. They taught that political laws, because of their source and motive, tyrannise over men and force them to much that is contrary to Nature.

This opposition is clearly brought out in the speech which Sophocles places in the mouth of Antigone, when, denying to the king his right to forbid the burial of her brother, she exclaims : —

> " Nor did I deem thy edicts strong enough
> That thou, a mortal man, should'st over-pass
> The unwritten laws of God that know no change.
> They are not of to-day nor yesterday,
> But live forever, nor can man assign
> When first they sprang to being." [1]

Résumé

The Sophists have been compared to the French Encyclopædists, but it is a comparison that is not correct in all respects. Both attacked existing political beliefs, but did so from different standpoints. The Encyclopædists, starting from an acceptance of the allied principles of freedom and equality, attacked the state as an artificial condition of slavery and inequality. The Sophists, starting from an empiric individualism and natural inequality, found in the state an artificial freedom and

[1] " Philosophy formulated in its conceptions that opposition between a natural divine law and the written law which formed the theme of the *Antigone* of Sophocles." Windelband, *History of Philosophy*, Eng. transl., p. 74.

Professor Ritchie in his *Natural Rights* (p. 30, note) cautions us that the passage quoted in the text really means "that Antigone is more moved by custom and traditional religious belief about the duty of burying relatives than by fear of a tyrant's prohibition. It is no appeal from all institutions."

equality. So far as they framed a practical political platform it was not to get rid of the state, but, by placing its government upon a democratic basis, to lessen the evil results of its essentially selfish basis. In one very true sense, however, their work deserves to rank with that of the Encyclopædists, and with that of all liberalisers of thought. They taught that for truth one must appeal to individual reason. They destroyed at a blow the old naïve dogmatisms and the fantastic cosmologies of their predecessors, and paved the way for the ethics of Socrates and Plato, and the syllogistic logic of Aristotle.[1]

[1] Cf. Weber, *History of Philosophy*, Eng. transl., p. 62, and Janet, *Histoire de la Science Politique*, etc., Vol. I, pp. 53 *et seq.*

CHAPTER VI

SOCRATES

For a time it seemed that the immediate effect of the teachings of the Sophists would be ethically and politically demoralising. Guided by their doctrines the social and ethical bonds of the already politically corrupted Athenian community seemed upon the point of dissolving. This was a necessary result which followed from the peculiar character of Greek public life. While the political temperament of the Greeks, assisted by the topography of their country, led to the development of the "city-state," rather than the "national state," as their civic ideal, their philosophic conception of the nature of the state led them to view it not so much as a means for furthering human development as an end in itself. Thus the state came to be considered as the all in all, and the citizens as of significance only as subjects of the state. These two elements, the practical and the philosophical, though not logically connected, became actually united, for it was only the comparatively small size of the city-state that rendered practically possible the employment of that unlimited range of governmental powers which logically followed from the conception of the state as "natural" and, therefore, indirectly divine. This civic intensity of Hellenic city life required for its maintenance an absolute self-surrender of the individual, — an unreflective, uncritical patriotism. For its continuance it was dependent upon the continuation of the Hellenic spirit in its full strength, — "when," as says Felix Dahn, "the subject without thought submitted himself to the substantial em-

bodiment of the national spirit as traditionally expressed and represented in religion, customs, and the state, and thus submitted himself with a feeling that things could not be otherwise." When, then, the Sophistic philosophy arose which destroyed this unthinking self-surrender, political demoralisation and disintegration was the necessary result. The very moment that doubt entered and the people began to question the propriety of the demands that were made upon them by their state, that very moment the stability of the whole political structure became endangered. Because, before this, the Greek citizen had not first clearly thought out the distinction between his rights and duties as a man, and his rights and duties as a citizen, and had then rationally harmonised them, but instead, had absolutely identified them, — because of this, that very doctrine of the right of private judgment which the Sophists taught, and which, properly interpreted, lies as the true basis of our modern political life, could not but operate as a destructive element in Grecian thought.

Athens did not lack thinking men who, observing the political decadence of their city, strove with what might they had to stem its progress. Pericles, accepting democracy as an inevitable fact, endeavoured to use its forces for good. By rendering Athens beautiful and great, by stimulating all forms of artistic and literary activity, he hoped to create that civic enthusiasm which a democracy needs for its successful maintenance. Æschylus in his dramas, and Aristophanes in his comedies, unceasingly held up to their countrymen a mirror in which they might see represented their follies and vices, and the evils to which they were rapidly leading. They erred, however, in trying to call the people back to old beliefs to which it was impossible for them to return, instead of attempting to correct the evils of the new.[1]

[1] "Æschylus, who had fought at Marathon and who more than any other Greek was endowed with the spirit of religion, interpreted the old

Efforts at regeneration such as these were foredoomed to failure. Only by finding some new moral ground upon which to found political obedience and civic patriotism, only by presenting some new ideal the conditions of which might be harmonised with the new political conditions and with rationalised methods of thought, could there have been even the hope of once more establishing that harmony of life and thought which the Hellenes had enjoyed before the time of the Persian Wars.

This was the problem as Socrates saw it. Impressed by what seemed to him the political degeneracy and ethical anarchy of his day, Socrates came forward with his keen dialectics to teach the doctrine that beneath all laws and customs, despite their variety and apparent contrariety, general rules of morality are to be found of so abstract and refined a character as to be capable of universal application, and of such essential rationality as to be intrinsically obligatory upon all men as intelligent beings. His doctrine, in other words, was that though there may appear to be inconsistencies in the rules governing the same subjects at different times or at different places, beneath these inconsistencies there may be discovered common moral elements which give to the rules their ethical validity in so far as they have validity at all. Thus was made the first deliberate attempt to seek out the pure

mythology in an ethical sense, and in this form worked it into a series of dramas whereby the history and institutions of the Greek people were shown to be due to a guiding Providence of inexorable justice, rewarding each man according to his works. Æschylus thus became not only the father of Greek tragedy, but also the sublimest teacher Greece ever possessed. For moral grandeur there is but one work in all literature that can stand by the side of Æschylus's *Oresteia*, and that is the *Divine Comedy*. Yet Æschylus was driven from Athens on the charge of impiety and died in exile." Davidson, *Aristotle and Ancient Educational Ideals*, p. 105. Of Aristophanes, Davidson says (*Ibid.*, p. 105): "For over thirty years this inimitable humorist used the public theatre to lash the follies and hold up to contempt the wretched leaders of the Athenian populace, pointing out to his countrymen the abyss of destruction that was yawning before them."

principles of practical morality. It is true that Socrates's own work went little beyond showing the inconsistencies of current Sophistic assertions, yet the doctrine which we have mentioned was there, and the positive side of the work which Socrates had begun was immediately taken up by his great pupil Plato, and continued in turn by the still greater Aristotle. From Aristotle's time to the present day speculative spirits, one after another, have continued this search for the canons of right and justice. Instead of taking each individual man as the subject of philosophical inquiry, and viewing his peculiarities and the caprices of his desires as the source of all his rights and duties, Socrates selected humanity as a whole, and sought to discover those fundamental characteristics which may be predicated of all men as a single genus. As a result of this method, he taught that what distinguishes men from other animals is the possession of reason, and that it is through this unique endowment that men participate in the absolute reason. As thus united by a common element, they are in their conduct necessarily subordinated to the general rules which that element prescribes. In other words, the abstract principles of truth and justice which natural law lays down are of absolute universality, binding upon all rational beings.

In many essential respects, Socrates accepted the doctrines of the Sophists. Like them he sought to subject current conceptions of right to the dictates of reason, and like them he clearly saw that in doing this each individual must, in the last resort, seek in his own reason the justification of the principles by which he is to feel himself morally bound, — that tradition, religion, law, or any *ex cathedra* utterances of others can give no final guidance in this respect. But, unlike the Sophists, he taught that in this investigation men are to be guided not by their simple impulses or capricious desires, but are to penetrate beneath them until they have discovered those fundamental characteristics that are common to all men as moral, spir-

itual beings ; and that, these discovered, they are to predicate upon them the principles by which their lives are to be governed. By self-reflection, above all by self-analysis, he asserted, it is possible for men to arrive at such a true knowledge of themselves that they will spontaneously recognise and obey the laws of truth and justice.

All virtue, he thus taught, is a necessary product of knowledge. No man is knowingly, deliberately, vicious. If men can be made to know the good, they will inevitably follow it. Through this idea of the value of knowledge in the teaching of virtue Socrates opened up a new territory to the Greek mind, and gained for himself the honour of being the real founder of the science of ethics.

Coming now to his special political views, we find that Socrates taught that man is intended by his very nature for a social and political life. His duties as a citizen are therefore real ones, and in the laws of his state he is to find in general the rules which are to govern his conduct. For, unless the individual is prepared to maintain a right of resistance to the whole political power to which he belongs, he must obey its commands. Particular laws he may recognise as unjust, but even if so, they are to be corrected not by resistance to them, but by purifying the political conditions which have made them possible.

The state itself, according to Socrates, is thus not a product of individual wills, but, as called for by man's very nature, a divine or natural product, and the individual may not therefore, simply as an individual, put himself into opposition to it. Man is indeed made the measure of all things, his individual reason is the final source of all authority ; but as we have already shown, this very reason which each man enjoys is but a part of that universal reason which governs all things, individual men, societies, states, the world.

As knowledge alone qualifies one for a wise and virtuous life, Socrates therefore taught that the administration of the state should above all be intrusted to those who

have the necessary wisdom. For this reason, among other things, he especially condemned as irrational the choice of public officials by lot, a practice then followed to some extent in the Athenian state. If the primary premise of democracy be true that all men are equally qualified to rule, then the selection of civic functionaries by a method which gives an equal chance of appointment to all is justified. But against such an irrational absolute equality of political consideration, Socrates strongly argued. In its place he would have had an aristocracy of intelligence, a state administered by a carefully selected body of educated rulers. In a superficial sense this is what the Sophists had taught. They had sought to teach those in political authority the means of maintaining themselves in power, and to assist those who sought political preferment to gain it. But in the end sought, in the motive which it was taught should lie back of the exercise of political power, the thought of Socrates was far different. The Sophists sought simply to impart to their pupils a dexterity by means of which they might, in the pursuit of their own selfish interests, gain and maintain themselves in political power, and it mattered not to them whether this dexterity consisted in the power to form sound opinions and to support them by valid arguments, or whether it meant but the ability to obtain the support of the less intelligent by simple eloquence or specious and wholly fallacious reasoning. By Socrates, on the contrary, political education was demanded in order that those in authority might be qualified to select and execute measures that would be for the true and permanent welfare of the state. "Socrates aimed at a knowledge by means of which the state might be reformed; the Sophists at one by which it might be governed."[1]

These two principles, the election of an educated magistracy, and the administration of the state in the interest

[1] Zeller, *Socrates and the Socratic Schools*, p. 169.

of the ruled, stood in opposition to the rampant democracy of the time, and we must believe that it was as much the animosity to them on the part of those in power as it was the alleged introduction of the worship of new and false gods, that led to Socrates's trial and condemnation.

Conclusion

It has been said that Socrates taught no system of philosophy, but only a system of life. This is quite true. He developed no special metaphysical doctrines. His aim was a purely practical one. Though he preached a gospel of knowledge, he asked that men become wise in order that they might be good. There was nothing scientific about his political teachings. The duties of public life he taught in the same way that he inculcated the domestic virtues. He had a high idea of the value of the family, of the dignity of labour, and believed in the essential equality of the sexes.

CHAPTER VII

PLATO: INTRODUCTORY

To extract from Plato's voluminous writings a definite philosophy of government is by no means easy. His works are in dialogue form. Several of them relate to politics, but considerable differences of views are found in them. He frequently indulges in metaphorical language, and often speaks in fables the exact meanings of which are not always immediately apparent. But, most of all, there is the difficulty of finding anywhere those precise statements and definite conceptions of the state as a body legally organised and operating through law which are so necessary for the formation of a coherent science of politics. Some authorities there are, indeed, who hold that Plato never had a theory of the state. Thus, for instance, says Sir Frederick Pollock in his brief *History of the Science of Politics*: "The Platonic Republic, I think, must be considered as a brilliant exercise of philosophical imagination, not as a contribution to political science. . . . It is hardly too much to say that Plato never got to the point of having a theory of the state at all." This, however, is an extreme view, and with care we think it possible to glean from Plato's writings a fairly complete political philosophy.

In studying the political views of Plato it is especially necessary that one should bear in mind the conditions of the time at which he wrote. In general the conditions were much the same as those that have been described in the chapter on Sophists, though, possibly, intellectual anarchism and political decay had advanced a degree farther. The sceptical thought of the Sophists had continued to under-

mine ethics and laws, and in Athens an unrestricted democratic rule prevailed. Constant legislation by *psephismata* had disordered the laws, the city was continually rent by the struggles of contending factions, ignorance and prejudice characterised many of the judgments of the popular courts.[1] Socrates had failed in his effort to strengthen the state by making men better and by deepening the foundations of their patriotism. Indeed, the actual effect of his critical method had been to weaken yet more the state's authority, while upon the positive or constructive side he had been absolutely unable to suggest any practicable means by which the reforms which he proposed might be put into execution. Finally, as tending still further to bring about a demoralisation of political thought, the Cynics, who followed Socrates and the Sophists, had taken in their philosophy an openly anti-social attitude. Declaring ordinary pleasures to be an evil, they asserted that the virtuous man should shun social and political life, and abandon all the human conventionalities and so-called artificialities of a civilised existence. In principle they maintained that all existing laws were without an ethical basis, and some of them went even so far as to attempt to put their precepts into practice. In the conduct of Diogenes, who disavowed his state, became, as he termed it, a "citizen of the world," lived in a tub, and discarded all superfluous clothing, is to be seen the character of some of the doctrines advanced.[2]

The work of Plato was to continue and to systematise the teachings of Socrates — to endeavour to bring back to men's minds a belief in the reality of universally and intrinsically obligatory principles of right. Though thus accepting the same ethical system as that formed by Soc-

[1] Upon the democratic character and the working of the Heliæa, see Bury, *op. cit.*, Vol. I, pp. 378 f.; Schömann, *Antiquities*, pp. 486 ff.

[2] In many respects Rousseau's conception of "naturalness" corresponded to the Cynic view. Herbert Spencer, also, does not entirely escape from the same idea.

rates, and actuated in his work by the same motives, Plato developed metaphysical ideas such as Socrates had never formed and probably would have rejected had they occurred to him. Furthermore, in outlining an ideal polity, in which his ethical ideas should be put into practice, Plato introduced political elements that would certainly have been repudiated by Socrates. To Socrates truth was something that might be grasped by any one who would apply himself to its pursuit. By a process of rigid self-examination of one's own ideas, he held that it lay within the power of every individual to arrive at those original verities which, as founded in reason itself, are the same for all men. His own office, and that of all teachers, he held to be — to use his own phrase — the obstetrical one of helping into the world ideas already implicit in the human mind, but requiring assistance in order to become explicit in the intelligence. Thus he taught that truth, though the same for all men, is yet individual — that it is in every case the particular product of, and has its existence only in the minds of, individual men.

The theory of ideas developed by Plato is something quite different. Instead of having its existence in the human mind, truth is conceived in the form of abstract, self-existent ideas, having their abode in a supernatural region above the skies. Instead of being cognisable by any human mind that employs the proper dialectic processes, truth is considered as something knowable only by an exceptionally endowed few, who, by developing their intellectual powers to an extraordinary degree, and by working themselves into a sort of metaphysical frenzy, are able to grasp its principles.

That such a divergence as this from the philosophical views of Socrates should find a reflection in Plato's political views is to be expected. Principles of freedom and, if not a democracy of ignorant and educated alike, at least a régime in which political preferment should be open to all who could show themselves qualified for it, would nat-

urally flow from the Socratic doctrine of the nature of knowledge and its accessibility to all. On the other hand, from Platonic principles would logically result a polity in which the individual, as such, would receive comparatively scant attention, and the necessarily ignorant citizen mass be subject to the absolute guidance of those select few who were able by natural endowment and education to comprehend the esoteric principles of absolute truth.[1]

According to Plato, the "good life" is the rational life as opposed to one governed by impulse. Virtue, therefore, consists in the rational ordering of one's conduct. Nature, he declares, fixes for men certain ends which are to be sought for as the highest good, and the task of philosophy is to disclose what these ends are and the means by which they are to be realised. The great Socratic principle that no one is knowingly and deliberately evil is accepted. Therefore, it is taught, the one means by which men are to be made better and happier is education. Thus it is that the ideal polity which Plato outlines in his *Republic* appears, primarily, as a pedagogic scheme. His state becomes a church and a school as well as a political institution.

Plato seems to have had, indeed, no conception whatever of the state as peculiarly a body operating through governmental organs established by laws, and as issuing its commands in a legal form. No distinction in essence is made by him between a large family and a small state. The body politic is viewed not so much as a political unit as a mode of life or a social order in which the virtues of justice may be developed and exercised. Thus Plato makes almost no effort to describe how a state should be governmentally organised, or the manner in which its administrative duties should be performed. Practically his entire attention is devoted to a statement of the ends to be sought by the state, and the general character of the social life thus called for.

[1] See some especially acute observations upon this point by Davidson, *Greek Education*, pp. 132 *et seq.*

In the philosophic system of Plato, politics and ethics, as practical sciences, are completely identified, and his principal political work, the *Republic*, is expressly declared to be devoted to a search for a true definition of justice, and his ideal state is one in which, as he believes, justice may be most nearly realised.

As thus identified with ethics, politics becomes, in the mind of Plato, not the art of maintaining civil order, protecting the state from foreign enemies, administering technical or legal justice, managing public finances, executing public works, etc., but, primarily, the art of making men better. In effect, Plato says the art of governing by laws is a comparatively low art. What difference does it make, he asks, whether men are required to conform to law or not so long as they are made better and happier?

In emphasising the public importance of education, Plato but followed out the universal tradition of Hellenic life. Everywhere throughout Greece, whether education was publicly given as in Sparta, or privately provided as in Athens, it was an accepted principle that it was a matter of great public concern that the individual should be adequately educated for the performance of his duties as a citizen. An active participation in public affairs was considered not only as a right but as the one important duty of the citizen. It was therefore but natural that, though the possession of public rights was based upon birth in the full citizen class, the exercise of the full rights of citizenship should be everywhere made dependent upon the possession of a specified amount of preliminary training.

But the citizen's education was not considered as completed with his entrance into a full participation in public affairs. His training was continued in and through the performance of his civic duties. To the Greeks, therefore, an active public life was not only the proper life for the individual, but the means through which his powers were to be developed, his character moulded, and all the higher forms of culture secured. Thus the state became

to him a true university. In those days very little education was, of course, to be gained from the written page. All advanced instruction had to be gained by actual contact with the wise, by participation in intellectual discourse, by engaging in or listening to debates in public places and arguments before the popular courts, by attendance at the theatres and games — in fine, by taking advantage of all those varied forms of intellectual activity which characterised the intense civic life found in all the principal Greek cities.

CHAPTER VIII

THE "REPUBLIC"

THE *Republic* of Plato, written when its author was in his intellectual prime, is easily the most important of his works. In other dialogues he has developed more particularly special doctrines, but in no other of his productions has he exhibited in so encyclopædic a manner the entirety of his philosophical system — ethical, metaphysical, and political.

The *Republic* has for its avowed aim, as has been already said, the determination of a true definition of justice. This inquiry is, however, made to take such a form as to necessitate a discussion of an ideal form of society. The construction of an ideal commonwealth is used as a means by which to display the peculiar moral nature of man in a plainer manner than it is possible to exhibit it by a study of the individual as an independent being. Observing that it is easier to read large than small characters, Plato declares that the real nature of justice may be found better exemplified in the affairs of the state than in the concerns of individual men.

After devoting his first book to a refutation of the Sophistic position that "might makes right," and that the unjust man may be happy, he turns to the positive task of stating his own views. At this point, by what seems an abrupt turn of argument, he asks: "Do we not say that justice affects the individual man and an entire state also? Is not a state a greater object than an individual? Perhaps, then, justice will be more fully developed in what is greater, and also more easily intelligible: we will first,

then, if you please, inquire what it is in states; and then we will, in like manner, examine it in the individual, searching for the similitude of the greater in the idea of the less."[1]

Thus it is that Plato launches himself upon the sea of political theory. The state is to be examined not so much with the idea of ascertaining its essential nature as of learning through it the nature and good of man. In determining upon this method of treatment Plato does not, as he is often said to do, assume that the life of the state is exactly similar to that of the individual except in magnitude and importance. His real position is, as later develops, that the virtues and vices that are exhibited by the individuals who, as public functionaries, administer a state, are in kind the same as those which they display in their private capacities. That is to say, the same motives hold sway, and the same characteristics of soul that make of an individual a good or bad private citizen, make of him a good or bad public official.

The state is not conceived of as having an existence apart from that of the individuals composing it. At the same time we find continually present in his thought a conception of the state which metaphysically or ideally seems to endow it with an existence of its own. Plato, as the student of philosophy of course knows, held that the universal or generic idea has a more real existence than the particulars subsumed under it, — that these latter have, indeed, an existence and a significance only in so far as they embody and manifest the universal. Applying this doctrine to the study of man, he often seems to find reality not in the individual, but in universal man, in mankind, or at least in some self-sufficing social whole. To him therefore the state appears as, in a sense, more real than the citizens of which it is composed, and therefore as illustrating in its nature the essential characteristics of humanity more perfectly than the individual with

[1] Transl. by Henry Davis, Bohn's ed., Bk. II, ch. X.

his peculiarities possibly can. In the perfect state, therefore, he declares, is disclosed the perfect man, the ideal of humanity illustrated and realised. As Jowett has put it, according to Plato, "The state is the visible embodiment of justice, under the conditions of human society. The one is the soul and the other is the body, and the Greek ideal of the state, as of the individual, is a fair mind in a fair body. In Hegelian phraseology, the state is the reality of which justice is the idea."

Concretely considered, the need for political organisation, according to Plato, arises from the fact of the weakness and imperfections of men, from the fact that, taken individually, men are not self-sufficing, have not the means of living a complete life such as that for which, potentially at least, they are qualified and destined. Only through coöperation and division of labour is opportunity given for the cultivation of all of men's powers, and for the satisfaction of all of their desires. "A state," says Plato, speaking through the mouth of Socrates, "takes its rise, methinks, because none of us individually happens to be self-sufficient, but stands in need of many things. . . . Thus, one assisting one person for the want of one thing, and another another for the want of another, as we stand in need of many things, we collect into one dwelling many companions and assistants, and to this joint dwelling we give the name city (*polis*)."[1]

Continuing, Plato says that men first unite the better to secure their necessities, food, lodging, clothing, etc. Corresponding to these primary wants, husbandmen, builders, weavers, and shoemakers are required. Even at this early stage of social and economic development, a division of labour will be convenient, for, he says, "We are not born each perfectly alike, but differing in disposition — one fitted for doing one thing, and another for another. . . . What then? Will a man do better, when, as a single individual, he works in many arts or in only

[1] *Republic*, Bk. II, ch. XI.

one?" "When one works in one," replies Adimantus, to whom he is speaking. The dialogue continues. "This, moreover, is also plain, methinks, that if one miss the seasonable time for any work, it is ruined? Clearly. Aye, for the work, methinks, will not wait on the leisure of the workman, but the workman must necessarily attend closely on his work, not in the way of a by-job? He must. And hence more will be done and better, and with greater ease, when every one does but one thing, according to his genius, at the proper time, and when at leisure from all other pursuits."

Applying this principle, thus determined, Plato goes on to show that more classes than those mentioned will soon be needed. The husbandman will not make the plough which he uses, and the weaver, the builder, and the shoemaker will each need many things which it will be inconvenient for themselves to provide. By a continuation of this argument he finally shows that the advantages of a social life increase until the social body reaches a size sufficient to permit the carrying out of the principle of division of labour far enough to provide for the economical satisfaction of all of men's rational desires. At this point the maximum utility of society and the state, according to his view, is reached. Any further increase of size will be followed by more disadvantages than advantages. No new economies of effort will be rendered possible, while, on the other hand, the harmonious ordering of social affairs will be made more difficult. The ideal size of the state is, then, in Plato's eyes, one which is sufficiently large to enable it to be absolutely self-sufficing and yet not too large to permit a unity of interest and sentiment among its citizens and classes.

In this account it will have been observed that Plato is concerned not so much with the actual historical origin of the state and the stages of its development, as he is with the statement of those wants of man which lead them to establish it. The principle of the division of labour is not

stated by him as an economic principle. Rather it is set forth to illustrate the moral fact that the individual man is not self-sufficient; that he needs what others have to give, and they what he has to offer; and that every one should do that for which he is best qualified by his disposition and attainments.

The question of the abstract right of the state to exercise a coercive force over the individual is not held by Plato to require an independent examination. The answer that he would have given to it has therefore to be gained by implication from the general premises assumed. From these it would appear that he takes it for granted that the authority of the state is justified by the fact that a political life is an initial and continuing necessity to men if they would live that good life for which Nature has intended them. In thus making the state a means to an end, Plato really departs to some extent from that idea of the state's absolute importance which had characterised early Greek political thought. For he thus makes the performance of public functions by the citizen a relative and not an unconditional duty. But this is, as it may be called, but a temporary departure from the classic principle, for Plato in the end arrives at a conception of civic allegiance, and a theory of the proper province of political control which in effect erects the welfare of the state into an end which is to be sought for on its own account.

This conclusion is arrived at in the following way. The state, though not conceived as the highest possible product of men's thoughts and actions is yet held to be, as we have said, an indispensable means for securing a truly good life. More than this, it is held to be not simply one among a number of indispensable means, but the one all-comprehensive agency. Now, the one fundamental virtue according to Plato's ethical system is justice. The highest life is therefore the just life, the one in which justice is both rendered and received. The ideal social

régime or polity is, correspondingly, one in which all individuals are educated to know justice and given the opportunity to realise it in their lives. But what is justice? Justice, according to Plato, to state the matter shortly, is the giving to each individual the opportunity for the exercise of those functions for the performance of which he is properly qualified by his mental, moral, and physical powers. The ideal polity, therefore, appears to Plato as one in which all individuals are grouped into classes according to their dispositions and capacities, and to each of these classes appropriate activities assigned. For bringing about and maintaining this correspondence between capacities and functions there is necessary some supreme power which shall be controlled by the most nearly perfect human wisdom possible, which shall take completely within its regulation the education of the citizens and the apportionment to each of them of the parts they are to play in the political and social economy of the nation.

Thus, though he declares the state to be a means rather than an end, Plato is very far from proposing to make its importance in practical life less than that which it had had in the past in Athenian history. Rather, his advice points to an extension of its activities. Whereas up to his time education had always been a private matter in Athens, he would make it public; whereas Athenian law had always recognised and supported the family and individual property rights, he would have these in a large measure annulled. To secure that régime of justice which he had developed in theory, he would, so far as possible, have all particular individual interests destroyed, in order that there may be no room for the play of selfish desires which will detract from that intensity and whole-heartedness of patriotism which the successful administration of his ideal state demands. Until this is done, he declares, there is no possibility of men securing justice for themselves, and therefore none for their obtaining true happiness.

Plato's ethics is hedonistic to the extent of teaching that

the highest good is an individual good, and that it is one the pursuit of which leads to happiness. It is, therefore, one which needs only to be known in order to appeal irresistibly to men. But Plato maintains, and this is an important point, that the concrete nature of this ideal good, and therefore the means for its attainment, are to be determined not by a utilitarian calculus based upon individual characteristics and desires, but by an ascertainment of the larger laws which govern all humanity or at least all bodies of men organised into units of a sufficient size to be self-sufficing and therefore large enough to be treated as in themselves wholes or universals. Thus, he declares, that social ideals must first be determined, and then, through realising them, individual virtue and happiness obtained. The final result will be the good of the individual, but this is not to be the object immediately sought.

It is upon substantially the above reasoning that Plato predicates unity as the key-note of his politics. The essential object aimed at in his republic is the securing of a régime in which absolute harmony of interest and unity of will shall everywhere prevail. Each individual is to enjoy the right and to perform the specific duties for which by natural powers and education he is best qualified. Out of this correspondence, happiness to the individual and prosperity to the state are to come.

The defect of Plato's treatment of the relation of the individual to the state is the same defect that appears in all his philosophical reasoning. This fault is the tendency to give to abstractions an independent existence, a reality separate and distinct from that of the particulars included under them. His mistake consists, not in giving to the universal an importance greater than to the particular, but in separating it from the particular and making of it a transcendental entity instead of an immanent principle. For, as Weber observes : "In themselves, the type of the individual which realises it, the law and the phenomenon which is its application, are but one and the

same reality considered from different points of view; observation and reasoning are merely two stages of one and the same method. A physic, a physiology, or an anatomy that is the creation of pure reason is inconceivable. The universal must be derived from the particular, because it cannot be found anywhere else. . . . The Utopian system of politics which sacrifices nature to an abstract principle, asceticism, monachism, the horror of matter which we find among the Neo-Platonists, the Agnostics, and even Catholics, all these elements are the logical consequences of a conception that makes the Idea a reality."[1]

The influence upon Plato's conception of the state of this philosophic fallacy of which we have been speaking, is further added to by his well-known tendency to reason from analogy to identity, or at least from similarity to complete parallelism. Thus in comparing the state and the individual he is at once led to exaggerate the unity of the former and, though expressly conceived as an abstract universal, to treat the political person as capable, like its individual prototype, of experiencing happiness, having appetites and desires of its own, and therefore as possessing interests apart from those of its constituent citizens.[2]

Philosophically considered, then, the state, if not actually a universal as distinguished from its citizens, who are viewed as particulars, is held by Plato to represent the true "idea" of man better than does any single individual. It thus becomes practically a superior order of being, almost a universal man. In strict accordance with this envisagement its functions are described in the same physiological terms that are employed in enumerating the activities of the human being.

Each man, says Plato, is a tripartite being, having within

[1] *History of Philosophy*, Eng. transl., p. 102.

[2] We also find this analogy sometimes reversed. Just as the state is conceived as a great individual, so, conversely, the individual is sometimes regarded by Plato as a miniature commonwealth with appetites and faculties corresponding to those found in the civic being.

himself the three distinct faculties of reason, spirit, and appetite. The first has its especial seat in the head, the second in the heart, and the third in the abdomen. These faculties he regards as severally so distinct that the lines of conduct which they dictate often conflict. But if spiritual and bodily health are to be maintained, they must coördinate, or, rather subordinate, their authority to one another. Each faculty should perform its proper function, and that function only. Reason should furnish the rule in all things, spirit or courage should supply the active energy required, and desire or appetite should provide the necessary stimulus. Thus the four cardinal virtues will be realised. Prudence will govern the whole man, fortitude will be displayed in the rational enjoyment of pleasure and the enduring of pain, temperance will be exercised in the indulgence of the appetite, and justice employed in the restricting of each faculty to the performance of its proper function.

When applied in his *Republic* to the state, this physiological and ethical analysis leads to the construction of the following ideal polity.

Citizens, Plato says, should be divided into three classes which, by the qualities that they possess and the relations that they bear to one another, shall correspond to the three faculties which have been mentioned as belonging to the individual. First, there should be the intelligent class composed of philosophers, who shall supply all wisdom to the state and have within their hands the entire power of issuing legislative ordinances; secondly, there should be the courageous, spirited, or military class, whose duty it shall be to maintain order and carry into effect the orders of the governing class; and thirdly, there should be the great unenlightened, unspirited, covetous, or appetitive class, devoted to agricultural or industrial pursuits, whose sole duty it shall be to obey the orders of the upper classes, and whose sole function to produce the materials necessary for the subsistence of the entire state.

While the two cardinal virtues of wisdom and courage are to find their whole sphere of operation in the activities of the philosopher and soldier classes respectively, the two other virtues, temperance and justice, are to be displayed throughout the whole body politic. That is to say, all three classes are equally to exercise temperance by subordinating their interests to the needs of the whole, and equally to assist in the realisation of justice by confining their activities to the performance of those functions which, by their peculiar characteristics, they are best suited to perform.

In working out this scheme of social and political organisation, Plato gives us an outline rather than a complete exposition. Only the duties and training of the two upper classes are explained in any detail. Of the lowest or productive class, although it is to include, numerically, the vast majority of all the citizens, he tells us almost nothing, and this, as Grote observes, is all the more remarkable in that, unlike Aristotle, he makes this class an integral part of his state. Slavery is accepted as a matter of course and with practically no discussion.

The members of the ruling or philosophical class are to be few in number and are to be fitted for their task, by a lifelong special training. In this way it is designed to get governors of such wisdom that their opinions will approximate infallibility. Because of the possession of this great wisdom no permanent laws are to be required for the philosophers' guidance or limitation. Indeed the existence of constitutional limitations, or of definite principles of private law, Plato conceives will be a detriment because, being necessarily in general terms, they will in many instances prevent the selection of special means and make impossible the rendering of particular judgments such as political expediency and abstract equity may require. Plato's republic, is, therefore, to be a state without laws; one governed entirely by special ordinances issued by its rulers as occasion for them arises.

In fact, as soon appears, especially in his treatment of literature, music, and the arts, Plato would, speaking generally, have the state control the very things which we of modern times leave absolutely free from regulation, and would refrain from establishing laws governing the subjects which we think should be publicly ordered. Thus he would make it a duty of those in control of the state to see to it that certain abstract principles of conduct are recognised, and that certain general laws regulate artistic and literary productions ; while, on the other hand, as has been said, the rulers in the exercise of their political powers, and even in the administration of justice, are not to be controlled by general, permanent enactments.[1]

The philosophical rulers are to dwell apart from the other citizens, and are of course to be relieved from all duties except those of pondering philosophical ideas and of giving the necessary directions to the soldiers or executive class. They are to be freed from all family and property cares, and thus be removed from all temptations to modify their judgments according to considerations other than those of the public good.

The members of the guardian or soldier class are to be educated to a certain extent, but not to a degree in any way approaching that required of the philosopher class. They are to live outside the city, to devote themselves largely to physical exercises, and to have the entire responsibility of seeing to it that the state is adequately protected against attack from the outside, and that the orders of the chiefs are obeyed on the inside. Like the philosophers, they are to be freed from the necessity of engaging in any economic pursuit, are to own no property, and are to contract no individual marriage ties. They are to live in common in large barracks, eat together at large tables, and be clothed alike. Their number is to be fixed as nearly as possible at one thousand adults of both sexes. They are to have children, but these are to be compara-

[1] Cf. Nettleship, *Philosophical Lectures and Remains*, Vol. II, p. 143.

tively few in number, as the size of the class is to be kept as nearly stationary as possible.

Plato gives us no hint as to the steps by which he would desire, or by which he would think it possible, for such a scheme as his to be introduced. He simply assumes this to have been accomplished, and concerns himself wholly with the means by which the republic is to be maintained in a healthy condition.

The two chief requisites for securing this are, he asserts, first, the securing of citizens qualified and properly disposed for the performance of the tasks assigned to them; and secondly, the maintenance of the classes — the two upper ones at least — at their proper size. The first he would secure by education; the second by a strict regulation of marriage and procreation.

The state, having abolished individual marriage among the philosophers and soldiers, is to see to it that men and women are so mated that the best breed of children will result. Unfit children are to be secretly got rid of, and every child born of an unauthorised union to be deemed an outcast. Especial pains are to be taken that no father or mother shall know his or her children; and marriage between parents and children is to be prevented by the rule that all children in the state born within the seventh and tenth months after a couple have been united, are to be considered their children. In fine, procreation and marriage are held to be public functions and to be regulated accordingly. As Grote says: "What Plato understands by marriage is a special solemn, consecrated coupling with a view to breed for the public."[1]

The communistic features of Plato's scheme are not made to extend beyond the guardian class. We are not told so expressly, but by inference are led to gather that the members of the great producing class are to possess private property, though extremes of wealth are to be pre-

[1] *Plato*, Vol. III, p. 205. Plato leaves it uncertain whether or not children born of unlawful unions shall be put to death.

vented. Each individual is to have his own trade or business, and is to maintain a separate household.

The differences between Plato's plan and modern communistic schemes is sufficiently plain. The basis of modern communism is economic. Its chief aim is to abolish poverty and to equalise the distribution of wealth. Plato's communism, on the other hand, is suggested not as a method of economic reform, but as a means for securing at once that unity of interests and that control over the breeding of citizens which he conceives his republic to demand.

Furthermore, according to Plato, absolute industrial individualism is to prevail, except as to the guardians and rulers who are not to mix in business at all. The only limitations placed upon the property rights of the industrials is that they shall contribute from their goods for the support of the class which directs and protects them. According to modern communistic ideas, all capables are to participate in production, and all produce to be handed over to the state for subsequent distribution among all according to some predetermined standard of distributive justice.

In education, and in the parts which they are to play in the Platonic state, men and women are to be treated alike. Actual physical, mental, and moral differences are, of course, to be taken into account, as they are as between man and man, but women *quâ* women are to be neither favoured nor discriminated against.

The system of training outlined by Plato is, to some extent, modelled upon Lacedæmonian principles. Like that of Sparta, it is to be public and practically lifelong. It is Athenian, however, in the emphasis which it lays upon the purely intellectual and æsthetical sides. Education is to begin at birth, the first care being to secure a sound body. Thus, up to the seventh year, the training is to be almost wholly in gymnastic exercises, including dancing. Story-telling is, however, to play a part, and music

as well. Nor is moral instruction to be wholly neglected. Both in the games that are played, and in the stories that are told, the children are to be taught to distinguish between right and wrong. With the seventh year reading and writing are to be introduced; with the fourteenth, mathematics. From the sixteenth to the eighteenth year military drill is to be given special prominence. Up to the twentieth year no attempt is to be made to divide the children into separate classes. At this age, however, those pupils who have shown especial aptitude for the higher intellectual branches are to enter upon a course of training that is ultimately to lead them into the philosopher class. Those less intellectually inclined, but of a marked fortitude or courage, are to be reserved for a special military training which is to fit them for final entrance among the guardians.

The philosophical novitiates are to spend the years from twenty to thirty in the study of science, — arithmetic, geometry, and astronomy being the chief subjects taught. At the age of thirty they are to begin a five years' training in dialectics or philosophy proper. This completed, they are finally ready for entrance into public life.

In the public positions then given them, they are to demonstrate in actual practice the abilities which they are supposed to possess. This period of trial is to last until their fiftieth year, at which age, if they have exhibited in their lives and in the performance of their administrative duties a satisfactory degree of prudence and wisdom, the door admitting them to fellowship with the philosophers is finally opened to them. "Thus, after a half a century of continuous education of body, mind, and will, they are reckoned to have reached the vision of the supreme good, and therefore fit to enter the contemplative class. They are now free men; they have reached the goal of existence; their life is hidden with God; they are free from the prison of the body, and only remain in it voluntarily and out of gratitude to the state which has

educated them, in order to direct it, in accordance with absolute truth and right, toward the Supreme Good."[1]

Throughout the long course of training subsequent to the twentieth year, the segregation of the students into special classes is not so rigid but that it is possible for an individual to obtain transference from one class to another according as special aptitudes or deficiencies are manifested. But these occasions Plato evidently considers will be extremely rare. So carefully is the breed to be seen to in the beginning, so great is the influence ascribed to heredity, and so complete the training provided, that, as he thinks, only by a rare *lusus naturæ* will a youth born in one class be qualified for entrance into another; or, having entered one class, find himself wrongly situated.[2]

Before leaving the consideration of Plato's classes, it should be pointed out that they provide for a social

[1] Davidson, *Aristotle and the Ancient Educational Ideals*, p. 148.

Professor Paul Shorey, of the University of Chicago, has prepared an especially valuable monograph upon the nature of the Supreme Good as conceived by Plato. The title of this pamphlet is, *The Idea of Good in Plato's Republic: A Study in the Logic of Speculative Ethics.* (University of Chicago Studies in Classical Philology, Vol. I.) Regarding the proficiency required of the rulers of the republic by Plato, he says: "To accomplish this they must in the first place be past masters in ethics and social science and in all their propædeutic and auxiliary disciplines, and they must have formed for themselves by means of this knowledge definite ideals of life, happiness, and social organisation, which will serve them as patterns in practice, and which will lend to all their enactments that converging unity of purpose which is wanting even in the best of those clever ministers to the people's desires who now pass for statesmen. Secondly, they must combine with this deeper ethical and political insight a dialectical and rhetorical skill that will enable them to relate all their scientific measures consistently to their ultimate ideals, to defend these ideals against unsettling criticism, and above all to confirm the multitude by argument or exhortation in their faith in that ordinary commonplace morality which is, after all, the most essential element of happiness and good government. All this Plato sums up in the postulate that the guardians of the state must know the idea of Good."

[2] Plato's discussion of this point is by no means as full as could be desired.

ordering widely different from that of the caste system as known in the East. Plato's highest class is to be composed of philosophers, not of priests; the different classes are not to be absolutely closed orders; birth is not to be conclusive of status; and the lowest class is not to be a servile one. Finally, and most important of all, property is not to be concentrated in the upper classes. Indeed, the reverse is to be the case, the rulers and warriors being made wholly dependent upon the industrials for the satisfaction of their material needs.

Seeking the rule of the best, Plato of course rejects democracy as an ideal constitutional form of government. His ideal is the aristocratic state. The details of governmental organisation are, however, not considered by him. Indeed, he treats the topic as really an unimportant one so long as the main principles which he has laid down are followed. Even the distinction between a tyrant and a legally constituted ruler does not seem to him to need much attention. It is the wise, not the legal, ruler whom he seeks.

In Books VIII and IX, however, Plato enters upon a classification and criticism of existing forms of government. Four governmental types are mentioned by him as perversions of an ideal form. These are: (1) the Cretan, Lacedæmonian, or Timocratic state, "the government of honour," a polity which, relatively, he most approves; (2) Oligarchy, "a polity full of evils," but deserving second praise; (3) Democracy, following next in merit; and (4) Tyranny, differing from, and worse than, all the others. Recurring to his favourite analogy between the state and the individual, he declares that these forms of government are distinguished from one another in much the same way that men vary in their dispositions. Thus the Cretan or Spartan constitution, he says, is by nature like the covetous, contentious man; the oligarchical resembles in character the avaricious man; the democratic is similar to the drunken or ill-poised man; and the

tyrannical the passionate, treacherous, and utterly unjust man.[1]

It is plainly to be seen that in his examination of the merits and demerits of democratic rule, Plato is greatly influenced by the political evils of his time, and that he is thus led to an extreme condemnation of it. "A democracy," he says in one place, "arises when the poor, prevailing over the rich, kill some and banish others, and share the state offices and magistracies equally among the remainder; for the most part the magistracies are disposed of by lot."[2]

The change from an oligarchic to a democratic form of government is usually brought about, he says, in the following way. The general desire for wealth, which is the prime characteristic of an oligarchy, leads its rulers to encourage, or at least not to restrain, the extravagance of the young and foolish, for thus the others, including themselves, become the gainers. As this policy goes on, moderation decreases among the wealthy, while discontent and desperation increases among the impoverished. Thus from both sides the way is prepared for the lawlessness of democracy. From out of democratic anarchy tyranny is born, "for excessive liberty seems only to degenerate into excessive slavery either in private individuals or in states."[3]

It is a mistake to consider the Platonic republic as simply an idealisation of the Spartan constitution. In many of its communistic features there is a resemblance between them,

[1] In his *Laws* Plato somewhat changes his ranking of existing governments, influenced, no doubt, by an altered opinion concerning the merits and demerits of democracy. In one place in Book IV he declares the rule of a good tyrant the most to be preferred of the ordinary forms, and, apparently, declares other forms should be esteemed according to the ease with which they may be changed into this form. In accordance with these criteria he arranges them in order of merit as follows: tyranny, monarchy, democracy, and oligarchy. As we shall see, his ideal government, as outlined in the *Laws*, is a mixed one, partly aristocratic and partly democratic. Cf. Whibley, *Greek Oligarchies*, p. 8.

[2] *Republic*, Bk. VIII, ch. X. [3] *Ibid.*, ch. XV.

as of course there must be between any two communistic states. But in many other and most essential respects the divergence of the two is marked. The one chief aim of the Spartan system of education was to prepare the citizen for war; that of the Platonic commonwealth is to fit him for peace, and for a higher intellectual and spiritual life. Again, the central idea of a government by philosophers, such as desired by Plato, had absolutely no analogue in the Lacedæmonian state. Such a rule stood, indeed, in absolute contradiction to mode of control found in the Doric city. While Plato planned to have his republic governed by rulers unfettered by positive laws and guided in their commands only by abstract principles of justice philosophically determined, the chiefs of the Spartan state were held rigidly bound by custom and traditional laws.

The one important element which the Spartan polity contributed to the Platonic ideal was the idea of unity of civic life. In the constitution of Sparta was exemplified a state organised and controlled wholly for the attainment of a single, specific public end, — military greatness. To this end every interest, public and private, was absolutely subordinated. It was this singleness of aim, this utter absence of warring and discordant elements in its public life, which probably most appealed to Plato, as indeed it did, as we shall see, to Xenophon and Aristotle as well. In addition to this the Spartan institutions had back of them a continuous undisturbed history of a far greater length than that to which any other Hellenic state could lay claim. Indeed, it was very commonly held that the Lacedæmonians could trace back the establishment of their constitution to the suggestion and sanction of Apollo and the Delphic Oracle. "It was this conspicuous fact," as Grote says, "which emboldened the Grecian theorists to postulate for the lawgiver that unbounded control over the life and habits of citizens of which we read not merely in the *Republic* of Plato, but in the *Cyropædia* of Xenophon and to a great degree even in the *Politeia* of Aristotle.

To an objector who asked them how they could possibly expect that individuals would submit to such unlimited interference, they would have replied, 'Look at Sparta!'"[1]

The ideal commonwealth as outlined in the *Republic* is usually referred to as a pure utopian type, and such in fact it is. At the same time it is a mistake to suppose that it was so considered by its author. The best authorities now agree that it was the intention of Plato to create, and that he believed that he had created, a political and social scheme which it was practically possible to establish and maintain. As evidence of this, there is, in the first place, the fact that very considerable portions of several of the books — V, VI, and VII especially — are devoted to a consideration of the practical means for its maintenance; and, in the second place, throughout the work it is apparent that Plato has the Greek state and Greek political conditions constantly before his eyes, and is consciously endeavouring to draft a polity suitable for them. Finally, we have his own express statement, several times made, that not only is such a state as he has outlined absolutely necessary for the health of a community, but that no state really deserves its name which is not controlled by the principles which he has laid down.[2]

In the efficiency of the elaborate educational scheme which he provides Plato has the greatest confidence. Through it, he believes the necessary dispositions and capabilities for rulership and guardianship will be devel-

[1] *Plato*, Vol. III, p. 209.

"His [Plato's] admiration of Sparta, like Aristotle's, was confined to one point. The Spartans were the only people in Greece who had deliberately adopted a certain principle of life and had carried it through, and both writers admired the care given to education of a certain kind, the respect for order and discipline, and the absorption of the individual in the social organisation which resulted from this; but both saw well enough that the Spartan life and the objects at which this organisation aimed were very narrow." Nettleship, *Philosophical Lectures and Remains*, Vol. II, p. 306.

[2] See on this point, Hegel, *History of Philosophy*, Vol. I, and Zeller, *Plato and the Older Academy*, Eng. transl., p. 482.

oped, and through the separation of the people into classes according to their mental characteristics, harmony and contentment among all will be secured. Each individual, he thinks, will thus feel that he is doing that for which he is best suited, and he will therefore be both satisfied and happy. The members of one class will not look with envy upon those of the other classes, for they will themselves recognise that they are not qualified to fill the stations which those others occupy and would therefore be miserable rather than content were they to be called upon to take their places. In result every one will feel that he is contributing at once to the happiness of the whole and to his own well-being.

After all has been said, however, it is quite plain that the question as to the possible success of Plato's political scheme is made to turn almost entirely upon the efficiency of the small philosopher or ruling class. To these men Plato ascribes an almost omnipotent power to cure the evils of state. As coming from a selected breed, as having enjoyed a lifelong training, their judgment is deemed infallible, and at the same time, by an exclusion of all economic and domestic interests, selfish rule is avoided.

Aristotle's general criticism of Plato's scheme is that so far from creating a state in which harmony and unity of interest would prevail, it would establish a polity in which discord would necessarily reign. So far from providing a single city, it would create two cities, or rather one city with two diverse and adverse elements in it. The special and peculiar education which rulers would receive would inevitably give to them, he says, a feeling of separateness from, and even contempt for, the great uncultivated class. We may agree with Grote that this point is well taken by the Stagirite. "Granting full success to Plato in his endeavours to make the guardians (the two upper classes) one among themselves," says Grote, "we find nothing to make them one with the remaining people, or to make the remaining people one with them. On the contrary, we observe

such an extreme divergence of sentiment, character, pursuit, and education as to render mutual sympathy very difficult, and to open fatal probabilities of mutual alienation : probabilities hardly less than if separate proprietary interests had been left to subsist among the guardians. . . . The entire body of guardians cannot fail to carry in their bosoms a sense of extreme pride in their own training and a proportionally mean estimate of the untrained multitude alongside of them."[1]

Another inherent weakness in Plato's plan, which Aristotle might well have mentioned, but did not, is that it is chimerical to hope that however carefully the people be segregated into classes the members of the lower ones will be content to receive as absolutely just, and obey with complete submission, the orders issued from above. The mere fact of their unenlightenment will prevent this by rendering it impossible for them to see the expediency and the justice of a social ordering which, however proper in the eyes of Plato or of the rulers of the state, condemns them economically to a condition of labour, and politically to one of servitude. It is but to repeat a well-recognised truth when we say that to recognise the justice, and contentedly to accept, a position of inferiority, requires a very considerable degree of ethical and intellectual development. Unless, then, the uneducated class be conceived of as so low in the intellectual scale as to be incapable even of perceiving their own debasement, and so steeped in the apathy of ignorance as to have no desire for either material or spiritual improvement, active discontentment with a régime that draws a sharp line of distinction between them and their more fortunate fellows is to be regarded as inevitable.[2]

[1] *Plato,* Vol. III, p. 213.

[2] Davidson succinctly sums up the defects of the Platonic scheme as follows: "With respect to this ideal polity, there are five points that deserve attention : (1) it is founded upon a crude metaphor ; (2) we are nowhere told how it is to be evolved out of existing conditions ; (3) it is founded upon truths accessible to only a small and exceptionally

In criticising, however, Plato's confidence in the efficiency of the educational scheme which he outlines, we must remember, to his credit, that his conception of a true education, and of the means by which it is to be secured, is of the broadest character possible. Every side of the individual, ethical, intellectual, æsthetical, and physical, is to be cultivated, and in the securing of this result all the agencies of society and of civilisation are to coöperate. Literature in all its forms, music, and the arts are each intended to play a pedagogic part. The function of the artist is declared to be the revealing to men of the beauty of the world. As we have already learned, to the Greeks generally, and to Plato especially, there is a rationality in the phenomenal world, and one of the ways in which this rationality displays itself is in the beauty of its forms and forces. Rhythm and harmony are held to characterise the very movements of the stars, and as he tells us in the *Timæus*, sight and hearing are given to men that they may see these beauties and hear, as it were, this music of the spheres.[1]

The part which literature and the arts are to play in the training of good citizens of course explains that state control of them which to us seems so absurd and oppressive.

The fundamental premise of Plato's educational theory is that the human soul is readily assimilative ; that give to it the proper environment, guard it from evil influences, surround it by good influences, and stimulate it with lofty motives, and it will infallibly respond as desired. In other words, his theory is that the soul is potentially good, and

gifted portion of mankind ; (4) it takes no account of human affection or individual weal, and therefore deals only with an abstract fragment of man ; consequently, (5) instead of being a means of freedom, it is an organ of the most complete despotism that can be imagined." *Greek Education*, p. 130.

[1] Nettleship (*Philosophical Lectures and Remains*, Vol. II, p. 116) calls attention to the interesting fact that Plato, and Aristotle as well, seem to attribute a greater educational influence to music proper than to sculp-

that the real function of education is to bring out the powers that are latent in it. If this premise be true, and if a scheme could be put into operation by means of which all the elements of culture could be made to play their proper parts in the development of men's minds and morals, possibly there might be justified that optimism of Plato's which has generally been termed utopian.

In final criticism of Plato's ideal, attention should be called to the fact that a very considerable amount of that sacrifice of individual interests upon the altar of civic unity which is demanded, is made to seem necessary to Plato because of his evident acceptance of the theory that in order to make men good is not sufficient to trust to education and morality to make them do what is right, but that, in addition, it is necessary so to circumstance them as to render it difficult or impossible for them to do what is wrong. Thus Plato, in abolishing the family and private property, thought to remove from his ruling classes the temptations to selfishness in much the same way that the mediæval monastic orders sought the sanctity of their members.

In the preceding paragraph the word *sacrifice* has been used. In a sense this does injustice to Plato's ideal. It was not his intention that the good or the happiness of individuals should be sacrificed to the good of the state. Rather his thought was that in his ideal state the citizens would severally find a truer good, and therefore a higher happiness, in leading a completely communal life than it would be possible for them to obtain under a more individualistic régime.

The question of the extent to which the chief features of Plato's ideal polity were original with him, and of the

ture. Sculpture is only alluded to in a list of other arts, and even then not expressly named. "It is a justifiable inference," says Nettleship, "that the existence of great sculpture in Greece was not so important an educational influence as we suppose." Nettleship gives a most illuminating critique of Plato's whole educational system.

extent to which he derived them from other sources, is an interesting one. Ritchie says [1] that it can be proved that the three great paradoxes of the *Republic* did not originate with Plato himself. The abolition of private property was a part of the Cynic's general doctrine of a "return to nature." The idea of community of wives was also no new one. Euripides had referred to it, and Herodotus, speaking of a Scythian tribe, the Agathyrsi, says that they have wives and children in common "in order that they may all be children of one another." The equality of the sexes had already been satirised by Aristophanes in his *Ecclesiazusæ*, and as Ritchie says, a comic dramatist does not caricature ideas until they have already become generally well known. Socrates also, as we know, held that the virtues of men and women are the same, and if so, their equal treatment in the state would logically follow. Finally the doctrine that philosophers should rule is Socratic. As Xenophon tells us in his *Memorabilia*, [2] Socrates declared that "the true kings and rulers are those who have the science of ruling." "Is this not," asks Ritchie, "the crowning paradox of the *Republic?*" "In the literal expression," he continues, "Xenophon's Socratic saying is reproduced in the doctrine of the *Politicus*, which is not, however, put into the mouth of Socrates. The whole philosophic state of the *Republic* is simply a translation into 'large letters' of the undoubtedly Socratic doctrine that 'virtue is knowledge.' . . . Xenophon probably saw nothing more in what Socrates taught than a condemnation of the Athenian democracy he disliked. Plato may have greatly elaborated the picture, but the suggestion for it clearly came from Socrates. The abolition of the private family would probably not seem so objectionable to the husband of Xantippe as it did to Aristotle, whose family life seems to have been peculiarly happy; but it would certainly not be an idea to attract the sympathy of Xenophon or to be

[1] *Plato*, p. 55. [2] III, 9.

paraded in his apology for Socrates." Ritchie also refers, in another place (p. 51), to the probable influence upon Plato of the rules established by Pythagoras for the regulation of his brotherhoods or religious societies. These private societies were probably communistic only to the extent of having common funds for mutual aid, but that these societies themselves, with their rules, furnished in some degree a model to Plato in the construction of his state is very probable.

CHAPTER IX

"THE LAWS": THE STATESMAN

THERE can be no doubt but that in his *Republic* Plato stated his highest conception of civic excellence, and that in outlining his scheme he believed himself to be framing a polity possible of realisation among the Greeks.

As he grew older, however, he became less sanguine of this. This change of view, as we may imagine, was not wholly due to the natural tendency of an advancing age towards a greater conservatism, but, in a measure at least, to the outcome of events of his own time, and especially to unfortunate experiences of his own. In Athens, as in other cities of the peninsula, Plato witnessed a continued political degeneration. In addition to this he suffered in his own life what must have been the very bitter experience of seeing come to nought the one chance that he had of exercising, through his philosophical ideas, a direct influence upon actual political affairs. During his first visit to Sicily he had formed an ardent friendship with Dion, the brother-in-law of Dionysius I, the tyrant of Syracuse. Though driven out of the country at that time, and, in fact, sold for a while into slavery because of the freedom with which he had expressed his political opinions, Plato later, after the death of Dionysius, returned to the island at the invitation of his successor, Dionysius II, and of Dion, and was requested to give his advice for the proper governing of the city. For a time, then, Plato, if the reports that have come down to us are to be believed, became the virtual ruler of Syracuse; but the harshness of his criticisms and the severity of his demands soon

brought him into disfavour with Dionysius, and in despair of being of any aid, he returned home. As a final sequel to his efforts, he had to see the disgraceful conspiracy and violent death of his friend Dion. As a result of this entire Sicilian experience, it is but to be expected that Plato's confidence in the power of abstract truth to secure political regeneration would have been shaken.[1]

At any rate, whether because of age's sobering influence or of personal disappointments, we do find in his later writings that Plato, though he nowhere showed a change in his political ideals, ceased to hope for their perfect realisation. In other words, he evidently came to perceive that an appreciation of abstract philosophical truths as to the nature of pure being and of the highest good, though representing the highest attainable and most important knowledge to men, is yet not that sort of wisdom which is to be relied upon for the government of men who are not already moralised and enlightened. Instead, therefore, of a state governed by philosophers without laws, he applied himself to the task of constructing a civil order in which prudence, self-control, and practical political wisdom should take the place of philosophical attainments, and in which permanent general laws should be substituted for casual judgments rendered by philosophers in accordance with abstract principles of right. Of the rulers of this new state, therefore, practical insight is required rather than cleverness of philosophical vision. In the curriculum of their studies, theology and Pythagorean arithmetic are substituted for dialectics.[2] Furthermore, civic obedience is to be strengthened by the introduction of teachings calculated to increase the ordinary citizen's belief in the gods and in the inviolability of traditional customs. Certain canons of orthodoxy are to be declared, and no dis-

[1] Cf. Plato's description of the "Tyrant" in the *Gorgias*.

[2] See *infra*, the Nocturnal Council. The importance which Plato seems to attach to the mathematic absurdities of the Pythagoreans is held by some to be an evidence of his failing powers.

sent from them to be tolerated. Thus it is declared that no one shall be permitted to assert that there are no gods, or, if there are, that they either do not concern themselves with human affairs, or, if they do, that they may be influenced by prayers or sacrifices.

This modified ideal Plato develops in his prolix dialogue known as the *Laws*. The title *Laws* is an appropriate one and well describes the nature of the treatise. Inasmuch as the state is to be governed by laws rather than by particular decrees based upon abstract principles, it becomes of course necessary for Plato, in the construction of a complete polity, to declare what the provisions of these laws shall be. Thus, while in the *Republic* comparatively few legislative details are given, in the *Laws* a preponderant space is devoted to them. In a tedious way specific laws are laid down for the regulation of the most trivial of human actions and interests. Unfortunately, moreover, these legislative minutiæ are given in no coherent order, and without any very evident attempt to apportion the amount of discussion according to their relative degrees of importance. Particular laws are taken up at random, apparently as they happen to occur to mind; sometimes they are preceded by elaborate introductions, but at other times, and more often, brought up and dismissed without comment. The work has thus no claim whatever to the title of a code, or even to what the English call a "Theory of Legislation."

The laws, Plato thinks, should be mandatory in form and have prefixed to them elaborate statements of the reasons for their enactment. By these prologues, as Plato thinks, the people will be made more willing to obey. That is to say, compulsion and persuasion are to be blended. "The seductions of the rhetor are to be combined with the severities of the lawgiver."[1]

In pursuance of this idea, Plato not only outlines the specific enactments which he would advise, but gives us

[1] Grote.

— often at great length and with extreme ardour — his ideas as to the introductory statements that should precede them. Indeed, he sometimes gives us the prologues without the laws, saying, in such cases, that it is impossible to formulate in definite, peremptory language the regulations required.

In giving up the philosophical absolutism of the state, Plato necessarily abandons, or modifies, many of the other features of his earlier ideal. The communistic features of the republic are very considerably changed. Instead of community of property, he provides for an equal division of land among all the citizens. But each citizen is to consider the portion so assigned to him as really belonging to the state, and as given to him to be used only for the advantage of the social whole. In order to maintain this equality of distribution, inheritance is limited, the use of money interdicted, interest forbidden, alienation of real estate not allowed. It is not required, however, that absolute equality of wealth shall be maintained. Extremes only are to be prevented; no one is to be allowed to become more than five times as rich as any of his neighbours. Marriage is permitted, but always subject to the control and regulation of the state. Thus, whereas natural inclination might lead like to marry like, the state is to see to it that contraries are united, in order that the children shall not be one-sided in their abilities, but be harmoniously gifted. At the age of twenty-five men may marry. They must be married before thirty-five. The marriage age of women is to be between sixteen and twenty. Superintending matrons are to oversee the conduct of married couples. The first ten years after marriage are to be devoted to the bearing of children for the city. After this time supervision is to cease. No citizen is to be allowed to practise any trade, and no artisan to carry on more than one vocation. There is to be no retailing or reselling of any article for profit. The produce of land is to be distributed to the citizens by the pub-

lic authorities. The number of citizens is to be kept, if possible, at five thousand and forty, this number being selected, apparently, because of the large number of prime factors contained in it. It is recommended that the city be, at its centre, ten miles from the sea, that it be located upon a hill or hills rather than upon a plain, and that, industrially, it be as largely agricultural as possible.

As in the case of the *Republic* it is taken as a matter of course that there shall be slaves. The *Laws* especially requires, however, that they shall be well treated.

While, as in the *Republic*, Plato would have the state control the begetting of children, he does not provide in his *Laws* that their education shall begin at birth. Up to the seventh year they are to remain with their parents. After this time, however, their education is to be very similar to that recommended in the *Republic*, except, of course, instruction in pure philosophy and dialectics is no longer to play a part. Women are still to take an active part in public affairs, but are no longer to be relieved of their domestic duties, the children, as said, being under their care until the seventh year.

As regards the segregation of the citizens into classes, Plato abandons the threefold division of the *Republic*, and in its place provides for two orders, — the freemen, who are prohibited from engaging in trade or industry and correspond quite closely to the military class of the republic, and the industrials or slaves. For administrative purposes solely, the free citizens are grouped into twelve tribes. They are also grouped into four classes according to the amounts of property possessed.

In drafting the form of government to be established, Plato recognises that it is impracticable to exclude from political consideration the elements of numbers and wealth. Therefore, instead of the pure aristocracy of the *Republic*, he provides for a control in which there are many democratic features. A popular assembly is to exist with attendance compulsory upon the wealthier members. Very little

is said as to the exact functions of this body, but they are clearly not intended to be very important. There is also to be a so-called *boulé*, which is to be divided into twelve sections, each one of which, upon successive months, is to act as an executive council of state. The members of the *boulé* are to be elected yearly, in equal proportions from each of the four property classes, by a scheme, however, which practically gives to the wealthier classes the decisive electoral power.

The general supervision of the laws is placed in the hands of thirty-seven guardians or nomophylakes. To these functionaries is also assigned the duty of classifying the citizens according to their wealth. When elected, these nomophylakes must be fifty years of age, and are to serve until seventy years old.

For changes in existing laws, it is provided that there must be a joint agreement between the magistrates, the people, and the oracle. This oracle is to be the society of the priests of Apollo. Besides thus participating in the legislative power, this priestly body is to have a general power to review the conduct of all magistrates at the close of their terms of office, and to award praise or assign blame as the case may require.

Tribal or village courts are to serve as a judiciary, with the right to suitors to appeal from them to courts composed of higher officials of the state. These tribunals are, however, to be for civil disputes only. All criminal causes are to be heard and decided by the assembly of the whole body of free citizens.

The general responsibility for the defence and the maintenance of order is to be given to sixty agromi (five from each tribe), who are to be assisted by sixty junior associates.

Besides the officers already mentioned, priests, superintendents of education, of gymnastics, and of music are provided for.

One governmental organ described by Plato in his *Laws*

remains to be mentioned. This organ is in some respects intended to be the most important of the whole governmental structure. For its especial function it has the responsibility of seeing to it that the state remains true to that general aim for the realisation of which it was originally established. It is thus *par excellence* a conservative organ. All legislative projects, all new departures of policy, are to be scrutinised by it to see that nothing in them is inconsistent with the general character of the Platonic ideal. In form this organ is to be a board or council, and, because of its meetings being held before daybreak, to be known as the Nocturnal Council. It is to be composed of ten of the oldest nomophylakes, who have gained especial distinction in the public service. With them are also to be associated ten young men of thirty years of age, nominated, one by each of the nomophylakes, and approved by all.

The *Laws* closes abruptly without giving, as would be expected, a description of the special training which the members of this important council should receive.

The Statesman

A minor political work of Plato's remains to be described — the *Politicus* or *Statesman*.

This short dialogue stands, in some respects, midway between the *Republic* and the *Laws*. Though closely resembling the *Republic* in its idealism, it closely approximates the *Laws* in literary style and bitterness of thought. Its apparent aim is the determination of the characteristics, intellectual and ethical, of a true ruler. In following out this inquiry Plato is led to a brief statement of the same political ideal as that found in detail in his *Republic*. At the same time there is introduced that doubt as to its practicability which becomes controlling in the *Laws*.

The dialogue begins with an examination of the ends to be sought respectively in the arts of the herdsman, the

steersman, the weaver, the physician, and, finally, the statesman, and a discussion of the qualities required of those who would successfully practise them. It is, however, upon the art of the statesman that the attention is chiefly fixed.

In his description of governments, Plato begins with the ordinary Greek division of them according to whether the ruling power is in the hands of one, several, or many. This simple numerical criterion, he goes on to declare, is not satisfactory, having only a form significance. To this simple idea he then adds the distinguishing elements of force and consent, poverty and wealth, lawfulness and lawlessness. Applying these differentia he divides governments into six classes, as follows: (1) kingship, the rule of one according to law, and with the consent of the ruled; (2) tyranny, the rule of one by force and without legal right; (3) aristocracy, the rule of the meritorious few; (4) oligarchy, the rule of the wealthy few; (5) democracy, the lawful rule of the many; (6) democracy, the lawless rule of the many. In order of merit he places monarchy and aristocracy first, democracy second, and oligarchy and tyranny last. Better, however, than any of these actual forms, he declares, is the ideal one in which the state is ruled by one all-wise ruler, who needs neither the instruction nor the limitation of permanent laws.

The remainder of the dialogue is devoted to a discussion of what should be the characteristics of such a ruler, and what the manner in which his authority should be recognised. Having declared the day-labourer and merchant disqualified for rulership, he fixes, as in his *Republic*, upon the truly wise man as the only one qualified to control a city. The idea that such a one should be unhampered by law is emphasised.

In the *Politicus*, then, as in the *Republic*, the possession of knowledge is made the one requisite of a ruler. The character of the knowledge insisted upon is not, however, made quite so high. Instead of a comprehension of the

pure truths of philosophy Plato in this shorter dialogue seems to have in mind rather a power of perceiving and avoiding practical political difficulties, and an ability so to read men's minds, and so to guide one's conduct and speech, as to secure the confidence and willing obedience of those over whom authority is to be extended.

Conclusion

As Janet remarks, Plato was more of a moralist than a publicist. The principle of his ethics that the idea of the good is the highest aim of human conduct, that one should seek the good for its own sake, is true. The principle of his politics however, even as that principle is modified in his *Laws*, that the state can, and should, take under its absolute control the entire lives of its citizens, is false. As a practical principle it is false because it either postulates an infallibility or something very near to it in the rulers of the state, or as Mill says "such a depth of comparative imbecility in the rest of mankind as to unfit them for any voice whatever in their own government, or any power of calling their scientific rulers to account."[1] His ideal presupposes that the great mass of citizens will be content to lead a life of simple production and trade, and that they will be always willing to look for protection to a superior military class, and for guidance to a still higher specially educated philosopher class. By a simple process of artificial selection and rigorous training he believes, in other words, that not only will the several classes be qualified for the performance of their respective duties, but that they will each be rendered so conscious of their own powers and limitations as to be disposed willingly to accept the functions assigned them. Plato emphasises the important fact that the work of government is a skilled employment, a truth which democracies are inclined to belittle if not to forget. He teaches the fundamental truth that social and political justice means the giving to every

[1] *Dissertations and Discussions*, Vol. IV, p. 325.

individual that station and that work for which by disposition and training he is best fitted. He declares that the only ideal life is that one in which all the faculties of the mind and soul and body have opportunity for exercise and development. He makes of patriotism a lofty virtue, and places the good of the social whole above that of the individual. He broadens men's minds by disclosing to them a system of idealism which gives to truth such a pure form as to universalise it, and such a real existence as to render all things else unreal, and such a value as to make of its pursuit a religion. And yet withal he constructs a political ideal that is at once intolerant,[1] absolute, and impracticable.

An injustice will be done to Plato, however, if, in passing upon the final value to the world of his political speculations, the whole emphasis be thrown upon their utopian character. We may profit by many of the ideals advanced in them at the same time that we repudiate the means that are suggested for their realisation. This point is admirably brought out by Janet. "Nothing is more common," he says, "than to consider Plato as a political dreamer, who was deceived because he did not take experience into consideration, and because he wished to construct society on an impossible basis. An important distinction must be drawn here: one without which we cannot understand Plato, nor do his genius the justice which it deserves. A distinction must be drawn between utopian politics and ideal politics. The first consists in combining artificially, and by means of the imagination, the elements of which all society is composed, and thus creating an arbitrary mechanism, which has no life, no reality, no possible application, either present or future. Such are the Utopias of Sir Thomas More, of Campanella, and of some of our modern reformers. Ideal politics, on

[1] In the Platonic state no private form of worship is to be allowed. No one is to erect a private altar. Religious heresy is to be punished by long imprisonment and even death.

the contrary, consists in forming a true idea of the state, in conceiving it in its perfection (as much so, of course, as the limits of the human mind permit), finally, in presenting to societies a model, as morality presents one to individuals. No state will ever reach that perfection any more than any hero or any saint has ever attained or will ever attain perfection. But if we do not forbid morality to propose an ideal to men, why should we forbid politics to present one to peoples and to governments? Now, there is in the politics of Plato a utopian part and an ideal part. The first is dead and will not revive; the second is eternal. It is utopian in Plato to consider society as divided into four stereotyped classes, like the Indian or Egyptian castes; it is utopian to believe that the state will have more unity, more harmony, more patriotism because you have suppressed the family and property; it is utopian to have considered woman as like to man, and as capable of the same functions as man, — for instance, of bearing arms and of governing the state; it is utopian to suppress the laws in the state, and to replace them by education alone; it is utopian to make philosophers the governing class, and thus to confound speculation with practice; finally, it is utopian to exclude poetry from the republic, to reduce music and the fine arts to servile obedience to a fixed type, protected by tyranny, jealous of its arbitrary censure. But what is not utopian in Plato is to have conceived justice as the true end of society, and to have made justice consist in the concord and harmony of the citizens. What is not utopian, whatever the politics of Machiavellism may say to the contrary, is to have asserted that the true strength of the state is virtue, and that the true principle of virtue is education. Education cannot replace the laws, but it is education that gives soul and spirit to the laws. For what is the use of a law that is not observed? And what can sustain the laws, if not morals? What is not utopian, moreover, in Plato, is to have perceived before Aristotle that it was in a well-

moderated and well-balanced constitution that the only guarantee of liberty resided; to have exacted of legislators that they should give the reason for their laws when they promulgated them; finally, to have demanded for criminals, not only punishment, but amendment and amelioration." [1]

[1] Art. "Political Science," in Lalor's *Cyclopædia of Political Science.*

CHAPTER X

XENOPHON [1]

PLATO was not the only Athenian of his time who was led by an inspection of the unsatisfactory political conditions of his city to frame an ideal system of politics. In his *Cyropædia* Xenophon gives in a half romantic, half historic guise, his conception of a perfect polity.

Though an Athenian by birth, Xenophon was not an Athenian in disposition. Rather he was of the Spartan type, and indeed after his return from his Persian adventures we find him fighting with the Lacedæmonians at Coronea against his native citizens. For this he was not unnaturally banished from Athens, which, however, as a punishment, could hardly have been severe to him, as there is no evidence that he again visited his birthplace, though the decree of banishment was repealed at the time that Athens and Sparta became allies.

Xenophon's *Cyropædia* was written during his exile, and it is in form a description of the boyhood and education of Cyrus, and an account of the founding by him of the Persian Empire. The historian's task does not, however, seem to have weighed very heavily upon him, the work being prepared, as Cicero declares, "*non ad historiæ fidem, sed ad effigiem justi imperii.*" [2] Thus, to mention a single instance, which will serve to illustrate the historic character of the whole, Cyrus is made to die in bed,

[1] In the third volume of his *Plato* Grote gives an especially good account of the *Cyropædia* of Xenophon, and from it much assistance has been derived in the preparation of this chapter.

[2] *Ad Q. Fratr.*, I, 1. 8.

whereas the true circumstances of his death were already well known from the history of Herodotus, if from no other source. That Xenophon's real aim was to present an ideal rather than a veracious account of Persian history and institutions plainly appears also from the fact that while in his *Cyropædia* he represents the Persians as obedient and efficient subjects, elsewhere he speaks of having himself found them faithless, cowardly, and corrupt.

Xenophon thus begins his work:[1] "The reflection once occurred to me, how many democracies have been dissolved by men who chose to live under some other government than a democracy; how many monarchies, and how many oligarchies, have been overthrown by the people; and how many individuals, who have tried to establish tyrannies, have, some of them, been at once entirely destroyed, while others, if they have continued to reign any length of time, have been admired as wise and fortunate men.

"I had observed, too, I thought, many masters, in their own private houses, some indeed, having many servants, but some only very few, and yet utterly unable to keep those few entirely obedient to their command."[2]

After adverting to the fact that he had never seen herds of cattle conspiring against their masters, or disobedient to their rule, he continues: "While I was reflecting upon these things, I came to this judgment upon them; that to man, such is his nature, it was easier to rule every other sort of creature, than to rule man. But when I considered that there was Cyrus the Persian, who had rendered many men, many cities, and many nations, obedient to him, I was then necessitated to change my opinion, and to think that to rule men is not among the things that are impossible, or even difficult, if a person

[1] Eng. transl. by Watson and Dale, Bohn's ed., Bk. I, ch. I.

[2] In his *Œkonomikus* Xenophon has portrayed, in the character of Ischomachus, the ideal ruler of a family.

undertakes it with understanding and skill. . . . These nations he ruled, though they spoke neither the same language with himself nor with one another; yet he was able to extend the fear of himself over so great a part of the world that he astonished all, and no one attempted anything against him. He was able to inspire all with so great a desire of pleasing him that they ever desired to be governed by his opinion: and he attached to himself so many nations as it would be a labour to enumerate, which way soever we should commence our course from his palace, whether towards the east, west, north, or south.

"With respect to this man, therefore, as worthy of admiration, I have inquired what he was by birth, what qualities he possessed by nature, and with what education he was brought up, that he so evidently excelled in governing men. Whatever, accordingly, I have ascertained, or think that I understand, concerning him, I shall endeavour to relate."

In chapter II of Book I, Xenophon gives an outline of the Persian system of education, to which Cyrus was subjected. To begin with, he says: "Cyrus is described, and is still celebrated by the barbarians, as having been most handsome in person, most humane in disposition, most eager for knowledge, and most ambitious of honour; so that he would undergo any labour and face any danger for the sake of obtaining praise. Such is the constitution of mind and body that he is recorded to have had: and he was educated in conformity with the law of the Persians. The Persian laws, by anticipation, are careful to provide from the beginning that their citizens shall not be such as to be inclined to any action that is bad and mean."

Xenophon then goes on to explain this training, which is public, and in character mostly physical. To such a perfection is this physical development carried, he declares, that the Persians do not find it necessary ever to blow the nose or to expectorate.

Ethical instruction also finds a place. "The boys attending the public schools pass their time in learning justice; and say that they go for this purpose, as those with us say that they go to learn to read." Their presidents "also teach the boys self-control; and it contributes much towards their learning to control themselves, that they see every day their elders behaving themselves with discretion. They teach them also to obey their officers. . . . They teach them temperance."

Of intellectual instruction there is no mention.

These two short chapters finished, the remainder of the work is almost wholly a narrative of the military exploits of Cyrus in the extension of his empire. The narrative closes suddenly with the death-bed scene of Cyrus, and his remarkable speech of exhortation to his sons and friends.

In effect, then, taking an idealised Cyrus as a type, Xenophon finds in him a ruler, who, by disposition and training, is rendered able not only to maintain his authority absolutely, but by the manner of his rule, to secure his subjects' willing obedience.[1]

In education the Spartan system is taken as a model. Training is to be public, to begin at birth, and to endure throughout life. In this respect Xenophon is in agreement with Plato. In the object sought, however, he is at variance with him. Plato's training is primarily to prepare for good citizenship in times of peace: Xenophon's is to secure efficiency in time of war.

Though based upon a quite general training of the citizens, it is evident that the government he describes reduces itself to one in which a single will is to have absolute supremacy. Everything is therefore made dependent upon the wisdom of the one who is to exercise this will. In this respect the scheme resembles that outlined by

[1] Just as in his *Cyropædia* is explained the pleasure of ruling over cheerful subjects, so in his *Hieron* Xenophon describes the treatment of governing hostile and disobedient citizens.

Plato in his *Republic*. But the qualities required of Xenophon's ruler are very different from those predicated of Plato's philosophers. The ideal Cyrus is to have a training not different from, or more advanced than, that received by his subjects. It is not required that he should have received either musical, literary, or philosophical instruction. He is distinguished from his subordinates only in the excellence of his disposition and judgment.

In one respect, however, and a very important one, too, the Persian ruler is conceived of as a higher, or at least as a completer, type of man than the philosophers of the *Republic*. He is described as one who not only determines upon the lines of the public policy that are to be pursued, but sees to it that the corresponding orders are issued and cheerfully executed, and in the manner intended. "Herein," as Grote says, "we discern one of the distinctions between these two *viri Socratici:* Xenophon, the soldier and man of action — Plato, the speculative philosopher. Xenophon conceives the conditions of the true governor in a larger way than Plato, for he includes among them the forward and energetic qualities requisite for acting on the feelings of the subject many, and for disposing them to follow orders with cheerfulness and zeal: whereas, Plato makes abstraction of this part of the conditions and postulates obedience on the part of the many, as an item of his fundamental hypothesis. . . . Plato either neglects or assumes as a matter of course the sentiments of the persons commanded, or the conditions of willing obedience; while Xenophon dwells upon the maintenance of such sentiments as one of the capital difficulties in the problem of government."

Though suggested by Greek experiences, and undoubtedly intended for the instruction of his own countrymen, Xenophon's scheme is by no means in accord with the general features and ideals of Greek political life. Rather the type is Oriental. It provides for an absolute mon-

archy, albeit one so organised and administered as to secure the welfare and good-will of the governed. However, to quote from Grote: "Whatever we may think of the political ideal of Xenophon, his *Cyropædia* is among the glories of the Socratic family, as an excellent specimen of the philosophical imagination in carrying a general doctrine into illustrative details, and of the epic imagination in respect to varied characters, and touching incidents."[1]

[1] *Plato*, Vol. III, p. 592.

CHAPTER XI

ARISTOTLE

THE transition from the political speculations of Plato to those of his pupil, successor, and critic is an abrupt one. So altered is the form of statement, so different the modes of argument, and, to a considerable degree, so changed the conception of the proper province of political inquiry, that one seems to be entering an entirely new field of thought. Instead of rambling dialogues in which no one book is wholly devoted to the discussion of a single subject, we find in the writings of the Stagirite sober, straightforward, prosaic statements.

In the *Politics* of Aristotle we have a work predominantly practical in character. Ideals are framed, to be sure, and the means for their realisation stated, but they are ideals such as lie within the ordinary competence of a civil organisation to secure. Moreover, while Plato had been content to portray an ideal polity without attempting to describe the practical technical means by which the scheme was to be inaugurated and maintained, Aristotle's genius leads him not only to outline what he desires, but to give in explicit details the mode in which political prosperity and perfection are to be secured.

To the sane mind of the Stagirite it was clearly apparent that the ideals of Plato, even as modified in the *Laws*, were unrealisable. He was alive to the fact that if the downward course of the political life of his city were to be arrested, if health were again to be brought back to Athenian life, something more was necessary than the holding forth of such a visionary scheme of perfection

as that presented by his teacher. Its very loftiness of aim rendered it practically useless.

As a matter of fact, however, the ideal of Plato did not appear to Aristotle as absolutely perfect, even in idea. Plato never abandoned, even in his *Laws*, the aristocratic belief that a perfect state should be one in which the substantial power should be possessed by the elect, learned few, and that the great majority of the citizens should passively accept this rule and be content to lead a politically inactive, uninteresting, and unenlightened existence. In his *Laws* a share of power is in form allowed to wealth and numbers, but the electorial machinery is so adjusted as still to give the effective power to the few, and even this concession is not granted upon its merits, but because men are not morally and intellectually what they should be.

To Aristotle this appeared incorrect. To him it seemed that a perfect political life is one which enables all of the citizens to lead as complete a public life as possible. To him, as Newman says, "That state is not the best in which all citizens are not capable of living the best life and steadily purposed to live it. The best state is that in which the men of full virtue are not a mere handful, but the whole state, and are numerous enough to form a complete citizen-body — in which they have all the external conditions of the best life, and also adjunct dependent classes, not included in the citizen-body, to emancipate them from 'necessary work.' The best state is a brotherhood of men of full stature, intellectual and moral, animated by a common aim — the aim of living and helping each other to live the noblest life, active and speculative, that men can live."[1]

In this respect Aristotle's conception is thus a bolder and more ideal one than that of Plato, for it requires for all citizens, and not for a select few only, high moral, intellectual, and political attainments. At the same time,

[1] *The Politics of Aristotle*, Vol. I, p. 487.

however, it becomes in his hands a more practicable one. For while Plato had attempted the construction of a constitutional scheme which should be suitable to all times and to all peoples, Aristotle expressly states the fundamental truth that no one form of government can be said to be best under all conditions. The end ideally desirable may remain the same, but the special requirements of each people must determine the form of control that may most advantageously be established over them.

This principle being accepted, the introduction of a new method of political speculation follows as a matter of course. If constitutions are to be adapted to the peculiar conditions of time, place, and people, the political writer needs first of all to ascertain what those conditions are, and what their general influence upon political life. The description and analysis of existing and historical types of government Aristotle thus makes one of his chief tasks. Instead of being the simple art that it is in the hands of Plato, political science becomes a very complex one, — as complex as are the facts and forces that are dealt with. Each possible governmental form has to be described, its special requirements determined, and its peculiar defects discovered. Every feature and phase of public life has to be studied, every possible modifying circumstance considered, and its influence evaluated, every characteristic of the human mind, whether working in the individual or in a social group, analysed in order that the forces which may be expected to sway it may be known and taken into account. Difficulties have to be seen, dangers avoided, and ingenuity exercised in devising means for the harmonising of conflicting interests without the sacrifice of just claims or the abandonment of essential ends. This means, to quote again from Newman, that "the political inquirer must begin at the beginning with the simplest elements of society and work methodically upwards, not ignoring current opinion or practice, but correcting its confusions with the aid of a distinct conception of the

end of human life and of the state; he must make clear to himself and others the principles on which he proceeds; he must study the physiology and pathology of society, the occasions and the profound causes of social change; he must master the technical side of political science, and be prepared to deal practically with the concrete problems of political organisations, as they present themselves every day — to construct an oligarchy, or a democracy, or a tyranny, so as to be as little hostile as possible to human well-being. His treatment of political questions must be more patient and detailed, must rest on a wider knowledge of the past, must be more reasoned and systematic. And if the deepest thoughts and highest aspirations of the political inquirer would still find utterance in the portraiture of the 'best state,' this best state will no longer be seriously proposed for adoption everywhere; it will be a state *κατ' εὐχήν*, — an ideal representation of the acme of human society, realisable only when nature and fortune are in their most favourable mood."[1]

In his ethical as well as his political writings, Aristotle was actuated by the same aim that had urged forward Socrates and Plato in their speculations. Like them he strove with all his might to controvert upon rational or philosophical grounds the destructive principles with which his age had become saturated. With all the power of his great intellect he endeavoured to combat the doctrine that civil laws are essentially arbitrary, and that men are obligated to obey them only by self-interest.

This he attempted to do by showing that society or the state — he does not really distinguish between the two — is not artificial in the sense of being dependent upon the will and caprice of men, but is naturally given to them. Men, he declared, are by their inherent natures, by their essential needs and ends, destined for a social and political life. It is not, therefore, a matter of convenience or of choice whether they shall live in political aggregates.

[1] *Politics of Aristotle*, Vol. I, pp. 458–459.

It is absolutely necessary to them that they should do so if they would live that sort of life for which, by the strengths and weaknesses with which Nature has endowed them, she has intended them to live.

This policy of falling back upon an alleged "intention" or "will" of Nature in justification of a given assertion was not original with, nor peculiar to, Aristotle. Its use becomes, however, more conspicuous in his hands. In the eyes of the Stagirite phenomenal nature — *natura naturata* — is, as it were, the product of Nature conceived as creative — *natura naturans*. Furthermore, as he holds, this creation has been a result deliberately intended and for a conscious purpose. Thus he confidently speaks of Nature as intending this or that, as acting always teleologically. Whatever exists as a part of phenomenal nature, he holds, must have been intended to exist by Nature as creative and volitional. Thus man, through the exercise of his reason, may discover Nature's laws and Nature's will. When beings are discovered to possess peculiar powers or special potentialities, the conclusion must be that Nature intended them for a mode of existence in which those powers and potentialities should find opportunity for exercise and realisation, and, so far as these beings are rational, there is an ethical obligation upon them to strive to attain the ends thus marked out for them. Thus, according to Aristotle, man is intended for happiness. It is, therefore, his duty to seek happiness. His powers and weaknesses, his desires and passions indicate the need of social and political coöperation. Therefore state life is intended for him by Nature. Men come into the world differently endowed, physically, mentally, and morally. Therefore it is evident Nature intends for them corresponding stations of life. One is to be a master, another a slave; one a ruler, another a subject.

Those general principles of conduct which are ascertained by reason, when acting abstractly or by way of interpretation of Nature, are known in Greek philosophy

as natural laws. Such canons of right and justice are of course conceived as eternal and universally binding. Their essential rationality and rightness supplies their sanction. The distinction between them and the particular laws which owe their origin to the customs or commands of particular peoples is as plain to Aristotle as it had been to Plato. Thus in his *Nicomachean Ethics*, he says: "Of political justice one part is natural and the other legal (conventional). The natural is that which everywhere is equally valid, and depends not upon being or not being received. But the legal is that which originally was a matter of indifference, but which, when enacted, is so no longer. But to some persons all just things appear to be matters of law, because that which is natural is unchangeable, and has the same power everywhere. . . . This is really not the case. . . . That justice which is not natural but of man's invention, is not everywhere the same, since neither are all political constitutions, although there is one which would be by Nature the best everywhere; but there can be but one by Nature best everywhere. Every principle of justice and of law has the relation of a universal to a particular; for the things done are many; but each principle is singular, for it is universal."[1]

A little later on he describes the general laws of justice as "equity." Thus he says: "The equitable is just, but not that justice which is according to law, but the correction of the legally just. And the reason of this is, that law is in all cases universal, and on some subjects it is impossible to speak universally with correctness. In

[1] Bk. V, ch. VII. It is quite apparent from the first part of this quotation that to Aristotle the natural and the conventional are not antithetical. The two are frequently found contradicting one another, but there is no inherent reason why they should not always be in agreement, conventional laws standing to natural laws in the relation of particulars to universals. Indeed, at one place, he refers to the antithesis between the natural and the conventional as simply an argumentative device of the Sophists.

those cases where it is necessary to speak universally, but impossible to do so correctly, the law takes the most general case, though it is well aware of the incorrectness of it. And the law is not, therefore, less right; for the fault is not in the law nor in the legislator, but in the nature of the thing; for the subject-matter of human actions is altogether of this description. When, therefore, the law speaks universally, and something happens different from the generality of cases, then it is proper where the legislator falls short, and has erred from speaking generally, to correct the defect, as the legislator would himself direct if he were then present, or as he would have legislated if he had been aware of the case. Therefore the equitable is just, and better than some kinds of 'just'; not, indeed, better than the 'absolutely just,' but better than the error which arises from universal enactments. And this is the nature of the equitable that it is a correction of law wherever it is defective owing to its universality. This is the reason why all things are not according to law, because on some subjects it is impossible to make a law. So there is need of a special decree."[1]

In his *Rhetoric* Aristotle defines "equity" as follows: "Equity remains forever and varies not at any time; neither does the universal law, for this is in conformity to Nature; but the written law varies often."[2]

[1] *Op. cit.*, Bk. V, ch. X.

[2] Bk. I, ch. XV. Here Aristotle seems to make the distinction between written and unwritten law as identical with that between natural or abstract rules of justice, and particular laws created by men. It is not to be understood, however, that, as has already been said, either to Aristotle or to any Greek were all unwritten laws necessarily conceived as laws of Nature. It is true that at that time practically all the so-called natural laws remained unwritten, and that therefore, as in the quotation above, they are spoken of simply as such. But there never was any idea in the Greek mind that all unwritten laws were necessarily, or because of that fact, natural laws. If susceptible of statement in general terms, and absolutely just, they were natural laws. But in such cases this was so because of their generality and justness, not because of their unwritten form.

Another reference in his *Rhetoric* to the idea of natural law is where he says, "For there does exist naturally one universal sense of right and wrong, which in a certain degree are intuitively divine even should no intercourse with each other nor any compact have existed."[1] Empedocles is then cited as saying of a certain rule that "it is not right here and wrong there, but a principle of law to all. It is extended uninterruptedly throughout the spacious firmament and boundless light."

In giving his adherence to the doctrine of a natural law that stands superior to and, in cases of inconsistency, modifies conventional law, it is almost unnecessary to remark that Aristotle by no means accepts any such theory of "natural rights" as that put forward by the philosophers of the eighteenth century. Nowhere does he intimate that to the individual belongs the right of himself determining whether or not a given command of his state has the support of the natural law, and if not, of refusing obedience to it. What the state finally declares to be law is ethically and legally binding as to him. The principle of natural law is one to be employed only by the legislator to guide him in the enactment of just civil laws, or, as we have seen by the long quotation concerning the nature of equity, to enable judicial tribunals to correct laws where, by reason of the generality of their statements, they would otherwise work injustice. And even in such cases, as it will have been observed, it is not said that the natural law nullifies the civil law, but rather that it bends it to meet the exigencies of the special conditions to which it has to apply. In doing this the legislator's will is not regarded as resisted, but as in reality given that very effect which it would presumably have desired had the circumstances of the given cases been foreseen at the time the law was enacted. In his *Rhetoric* it is true that there are passages in which Aristotle is not as careful to surround his doctrines of natural law with the saving

[1] *Op. cit.*, Bk. I, ch. XIII, 2.

explanations which he attaches to them in his *Ethics* and *Politics*. As to this, however, it is to be remembered, as Ritchie properly points out, that in the first work Aristotle is dealing with ethical questions upon a confessedly low ethical plane. His immediate aim is the giving of instruction in argumentation, not the inculcation of moral doctrines. When, therefore, he advises orators that when met by an objectionable conventional law they should appeal to the higher, unwritten, universal law, he is to be considered simply as suggesting to them a common rhetorical device. "If you find the law against you," he says, "declare the law to be unjust, refer to the unwritten law, and quote *Antigone* of Sophocles." As Ritchie goes on to observe, Aristotle nowhere in his *Ethics* or *Politics* recommends to the individual a recourse to universal law in support of a disobedience to the civil law. Upon the contrary, in his *Politics*, where he examines the question whether an individual or the law should be supreme, he decides, unless the circumstances be very exceptional, in favour of the law.

As regards, however, this whole matter of the relation between natural and civil law, it is to be observed that it was impossible that the question should present itself to the Greeks in the same form as that in which it later appeared to the publicists of Europe. To the Greeks, as will be remembered, the state was never looked upon as primarily legislative of general judicial principles. To them all general laws (*i.e.* not simple decrees) derived their validity, not from the fiat of the political power, but from the inherent rationality of the principles which they stated. It is true, of course, that by the rendition of specific decrees in the settlement of disputes, and by the issuance of administrative orders, the state controlled many of the acts of the citizens. But it was never conceived as qualified to declare in general terms what should be considered as just and right. Thus, in fact, when Aristotle and other Greek writers speak of the civil or municipal law, they include under that name little more than special

decrees, and, even of these, as Aristotle remarks in the passage we have quoted from his *Ethics*, a considerable number have reference to matters in which no questions of right and wrong are involved. That is to say, they deal with concerns regarding which it is merely a matter of convenience that some rule should be stated.[1]

The Relation between Aristotle's "Ethics" and "Politics"

To Socrates and Plato, ethics had been the all-comprehensive science, which included politics as one of its special subjects of inquiry. In the eyes of Aristotle, however, politics appears as the master science. To him this general science has for its general aim the advancement of the welfare of mankind. Conceived upon its abstract or theoretical side, it has for its end the determination of the highest good of man. Viewed upon its practical side, its purpose is to ascertain the means through which this good may most nearly be secured. As so understood, its inquiries are regarded as falling within three distinct fields: (1) that of ethics, or the science of the individual good; (2) that of economics, or the science which has to do with the family or domestic good; and (3) that of politics, *in sensu strictiore*, which is concerned with the good of the social whole.

Aristotle is careful to say that the good of the individual, of the family, and of the state is the same in kind, but adds that just as the state exceeds in importance the family or the individual, so is political investigation more important than economical or ethical inquiries. In fact Aristotle carries on ethical speculations, as he expressly tells us, only as a preparation for his crowning work upon politics. The "greatest good," he says, is sought for especially in political science; "for it directs what sciences states ought to cultivate, what individuals should learn, and how far they should pursue them. We see too that the most

[1] *Vide* Cope, *An Introduction to Aristotle's Rhetoric*, p. 239, for a discussion of Aristotle's doctrine of natural laws.

valued faculties are comprehended under it, as for example generalship, economy, rhetoric. Since then this science makes use of the practical sciences, and legislates respecting what ought to be done and what abstained from, its end must include those of the others, so that this end must be the good of man. For although the good of an individual and a state be the same, still that of a state appears more important and more perfect both to obtain and to preserve. To discover the good of an individual is satisfactory, but to discover that of a state or a nation is more noble and divine. This, then, is the object of my treatise, which is of a political kind."[1]

Again, after referring to the value of both a practical and speculative training to one who would give practical advice, he says in the very last paragraph of his *Ethics:* "Perhaps, then, collections of laws and of constitutions would be useful to those who are able to study the theory, and to decide what is done well, or the contrary, or what kind of laws are suitable to certain cases: but to those who go through such collections without having formed a habit, the power of forming a correct judgment cannot belong, except it belong to them spontaneously; but perhaps they might thus become more intelligent on these subjects. Since, therefore, all former writers have passed over without examination the subject of legislation, it would perhaps be better for us to examine it ourselves, and, in short, the whole subject of politics, in order that the philosophy of human nature may, as far as is in our power, be completed. First, then, if anything has been well said by our predecessors on any particular point, let us endeavour to explain it; then from a comparison of the different forms of government, let us examine what kind of qualities preserve and destroy commonwealths, and each particular form of government, and for what reasons some are administered well and others the contrary: for when these points are considered, we shall perhaps be

[1] *Nicom. Ethics*, Bk. I, ch. II.

better able to have a comprehensive view of what form of government is best, and how each is regulated, and what are its laws and institutions. Let us then make a commencement."

Though Aristotle thus makes ethics a part of the general science of politics, he distinguishes in a sharper way than had Plato the respective fields of ethics and politics in its stricter sense. Plato never really separated the two. In his hands politics is swallowed up in ethics and disappears as a distinct study. The political and individual good are confused and the precepts of public and private morality thus examined as a single subject of inquiry.

General Character of Aristotle's "Politics"

The *Politics* is by no means a complete work, and few of the ancient writings that have come down to us exhibit greater intrinsic evidence of early editing. The story is, that the library of Aristotle was bequeathed by its owner to Theophrastus, and that from him it descended to a family which kept the manuscripts buried for 150 years in a cellar. They were then exhumed and taken to Athens, but in 86 B.C. carried by Sulla to Rome, and there fell into the hands of Andronicus of Rhodes. This is the account given by Strabo.

The works thus preserved were Aristotle's scientific works. All of the popular writings, which were best known in the two centuries before Christ, were lost.

Andronicus undertook the task of editing the mass of manuscripts which came into his possession. Some of them were in a very bad state, owing to worms and mould. The *Politics* was thus in a defective condition to begin with. But, more than this, it had evidently been left by its author in an unfinished shape. For example, in chapters IV, V, and VI of Book VI (Book IV according to the old arrangement) there is first an enumeration of

five kinds of democracy and four kinds of oligarchy, and then, immediately following, another enumeration of four kinds each, and with enough other differences to show that the second classification was not intended, as it has sometimes been held, as a modified recapitulation of the first. This is but a single illustration of a number of inconsistencies appearing in the work. Besides these, there are several serious gaps in the description given by Aristotle of his ideal state. Even the original arrangement of the several books of the treatise is not certainly known.[1]

In the last paragraph of the *Ethics*, which has been quoted, Aristotle points out the method which he is to pursue in his *Politics*. His conclusions, he says, are to be based: (1) upon a detailed study of all the constitutions

[1] Referring to these last two points a recent critic says: "Internal evidence shows that the last two books of the traditional order belong directly after the third, and they are so placed in all modern editions. We thus have, after three introductory books, the beginning of the development of the ideal state and its constitution. After discussing the size and position of an ideal city, — which is his limit of an ideal state, — the nature of its citizens, the tenure of land, the supply of water, and other matters of this class, he provides for the most careful training of the youth and then begins to treat of the best education. After briefly stating the regular subjects of public education — reading and writing, gymnastics, music and perhaps drawing — he enters unexpectedly on a detailed account of the uses and value of musical training, in the midst of which the fifth (formally the eighth) book suddenly breaks off and we have no more of the ideal state or its constitution. Andronicus probably assumed that this obvious break marked the end of the portion of the treatise which was preserved and arranged the books accordingly. Following this fragment on the ideal state, which was a mere introduction to the real subject, we have two books (now numbered six and seven) of rather loosely connected discussions, and finally in the eighth book a connected essay on the various dangers to which different forms of government are liable and the means of protection against them. The work comes to no natural end here, but there is no reason for thinking that Aristotle ever extended it further." Review of Süsemihl and Hicks, "Politics of Aristotle," in the *Nation*, November 21, 1895. Cf. Zeller's *Aristotle and the Earlier Peripatetics*, Eng. transl., Vol. II, p. 504, and Newman's *Politics of Aristotle*, Vol. III, p. xxxiv.

In the present work the citations have followed the old order of books. The English translation by William Ellis has been used.

of which he can gain a knowledge; (2) the discussions of political writers who have preceded him. As regards the first of these sources of information we know from frequent references by other writers that Aristotle did collect more than 150 constitutions. Except for the recently discovered account of the constitution of Athens, this work is, however, unfortunately lost to us.[1]

As regards the actual use made by Aristotle of this work, it would seem that the only constitutions which afford him positive information are those of Sparta, Crete, Carthage, and of course Athens. From the second sort of material, namely, the writings of previous speculators, very little assistance is obtained. The only writers whose views are examined are Plato, Phaleas, and Hippodamus, and of these Plato alone furnishes any considerable material, even for criticism. Hippodamus is mentioned as being the one who first developed the art of planning cities. The chief features of the governmental plan which he is said to have suggested were: (1) a threefold division of citizens into artisans, agriculturalists, and soldiers; (2) the permission of jurors to return qualified instead of categorical verdicts; (3) the giving of rewards to those discovering anything beneficial to the state; (4) the support at public expense of the children of soldiers killed in war; (5) the popular election of certain magistrates; and (6) the establishment of a sort of supreme or appellate court, the members of which were to be elected. The especial point of the polity of Phaleas, which is mentioned and criticised, was the equal distribution of landed property

[1] This treatise upon the constitution of Athens is divided into two parts: (1) an historical account of the development of the Athenian constitution from the earliest times to the reëstablishment of democracy after the expulsion of the Thirty Tyrants; (2) a detailed description of the various official bodies and persons in the state of his day. In the manuscript of the work which we now have the first part is practically complete. Of the second part considerable is lost, including the account of the procedure of the law courts. This loss, however, may in some measure, be made up from passages of it quoted by other authors.

among the citizens, — a distribution which Phaleas thought could be secured by a system of dowries according to which marriage portions should be given by the rich to the poor.

As regards its general range of inquiry, the *Politics* may be said to be neither a systematic work in political philosophy, nor a text-book on the art of government. But it is rather the latter than the former. Upon this, the practical side, Aristotle displays to the full his marvellous powers of analysis. The existing governments of the chief of the Greek cities are rigorously dissected, and a diagnosis made of the peculiar diseases to which each of them is liable. Based upon this, Aristotle lays down the rules of statesmanship that are to be followed if the threatened dangers are to be avoided. This instruction he imparts for the guidance of tyrants as candidly as he does for the assistance of aristocratic or democratic assemblies.

This portrayal by Aristotle of the character and causes of the political evils prevalent in the Greek cities of his time has been of immense value to students of Greek history and institutions. Also the practical political advice which he gives is in general of so profound and rational a character as to render it worthy of study by statesmen of all time. To the historian of political ideas, however, this portion of the treatise is not of primary interest, for in it nothing is contributed to the development of those speculative principles with which political philosophy is concerned. Therefore the commentary which is to follow will cover in the main only the theoretical elements in Aristotle's system. These elements are not always easily determined, many of them being assumed rather than stated. They therefore have to be ascertained by an examination of the work as a whole, or by reasoning back to the premises logically involved in the statements that are dogmatically made.

The Right of the State to Be

In the second chapter of his first book Aristotle attacks the problem of the nature of the state and the source whence the rightfulness of its authority is derived. In agreement with general Greek thought he finds the justification of domestic and political life in the nature of man which requires these forms of association for his highest well-being. The family is founded upon the primal sexual instinct, and its existence, in some form or other, is absolutely needed for the continuance of the species. Out of domestic life, says Aristotle, springs the need for property and slaves. Out of the union of families is born, first, the village, then the city or state. Thus, to use his own words, "That society which Nature has established for daily support is the domestic; . . . but the society of many families, which was first instituted for their lasting mutual advantage, is called a village, and a village is most naturally composed of the descendants of one family . . . for which reason cities were originally governed by kings: . . . for every family is governed by the elder, as are the branches thereof, on account of their relationship thereunto. . . . And when many villages so entirely join themselves together as in every respect to form but one society, that society is a city [*polis*], and contains in itself, if I may so speak, the end and perfection of government, first founded that we might live, but continued that we might live happily. For which reason every city must be allowed to be the work of Nature, if we admit that the original society between male and female is; for to this as their end all subordinate societies tend, and the end of everything is the nature of it. For what every being is in its most perfect state, that certainly is the nature of that being whether it be a man, a horse, or a house: besides whatsoever produces the final cause and the end which we desire must be best; but a government complete in itself, is that final cause and what is best. Hence

it is evident that a city is a natural production, and that man is naturally a political animal, and that whatsoever is naturally and not accidentally fit for society, must be either inferior or superior to man."

This argument, thus given, is reinforced by a deduction from the fact that men are possessed of the power of communicating to one another in speech their respective desires and sentiments. "The gift of speech," says Aristotle, "also evidently proves that man is a more social animal than the bees, or any of the herding cattle: for Nature, as we say, does nothing in vain and man is the only animal who enjoys it. . . . It is by speech that we are enabled to express . . . what is just and what is unjust: for in this particular man differs from other animals that he alone has a perception of good and evil, of just and unjust, and it is a participation of these common sentiments which forms a family and a city."[1]

In appearance the derivation of the state from the family is given as the result of a historical development by means of which that which begins in a single union between a man and a woman for the continuation of the species grows naturally and almost unconsciously into a larger and political union. As a matter of fact, however, when we examine the thought more carefully, we see that to Aristotle the family and the village do not represent so much the historical steps in human association as they do the stages in the development of individual desires and needs. His method is thus analytical rather than historical. His argument is as follows: So long as men seek only a bare existence and the satisfaction of nothing more than their most elementary physical desires, the family furnishes a sufficient social group. As, however, they are urged on by their nature to seek a fuller life, they find need for forms of social life in which they will have the opportunity of exercising wider activities, and of satisfying higher desires. To meet this need the village and state

[1] *Op. cit.*, Bk. I, ch. II.

are created. Thus the family serves as a preparation for the village and the village a preparation for the city, the process of associative growth being continued until a form of life is realised in which at last man finds himself able to attain the true end for which he feels himself destined. This is what Aristotle means when he says that man is by nature a political being. Those very faculties which make him the highest being of Nature require for their exercise that environment which life in a city-state alone can furnish. Thus only in the state does the individual really become a man. Without the state he might be potentially a man, but would be actually a brute.

As being thus essential to the individual's existence as a moral rational being, the state is declared to be, in idea, prior to man. "The notion of a city," Aristotle says, "naturally precedes that of a family or an individual, for the whole must necessarily be prior to the parts; for if you take away the whole man, you cannot say a foot or a hand remains, unless by equivocation, as supposing a hand of stone to be made, but that would only be a dead one; but everything is understood to be this or that by its energetic qualities and powers, so that when these no longer remain, neither can that be said to be the same. That a city, then, precedes an individual is plain, for if an individual is not in himself sufficient to compose a perfect government, he is to a city as other parts are to a whole; but he that is incapable of society, or so complete in himself as not to want it, makes no part of a city, as a beast or a God."[1]

Slavery

Aside from his general argument based upon the "naturalness" of political life, Aristotle, as has been seen, justifies the state's existence upon utilitarian grounds. It is upon this ground that he upholds the rightfulness of slavery among men. Where slavery exists under proper conditions, he says, the result is advantageous both to the

[1] *Politics*, Bk. I, ch. II.

master and to the slave. These proper conditions are that the slave is one who, by his capacity and disposition, is qualified only for servitude, and the master is one who is similarly competent to exercise rulership.

"It is from natural causes," he says, "that some beings command and others obey, that each may obtain their mutual safety; for a being who is endowed with a mind capable of reflection and forethought is by nature the superior and governor, whereas he whose excellence is merely corporal is formed to be a slave; whence it follows that the different state of master and slave is equally advantageous to both."[1]

Again he says: "We may perceive in an animal the first principles of herile and political government: for the soul governs as the master governs the slave; the mind governs the appetite with a political or kingly power, which shows it is both natural and advantageous that the body should be governed by the soul, and the pathetic part by the mind, and that part which is possessed of reason; but to have no ruling power, or an improper one, is hurtful to all; and this holds true not only of man but of other animals also, for tame animals are naturally better than wild ones, and it is advantageous that both should be under subjection to man, for this is productive of their common safety; so it is naturally with the male and female, the one is superior, the other inferior; the one governs, the other is governed; and the same rule must necessarily hold with respect to all mankind. Those men, therefore, who are as much inferior to others as the body is to the soul, are to be thus disposed of, as the proper use of them is their bodies, in which their excellence consists; and if what I have said be true, they are slaves by nature, and it is advantageous to them to be always under government. He then is by nature formed a slave who is qualified to become the chattel of another person, and on that account is so, and who has just reason enough to know

[1] *Politics*, Bk. I, ch. II.

that there is such a faculty, without being endued with the use of it. . . . Since then some men are slaves by nature, and others are freemen, it is clear that where slavery is advantageous to any one, then it is just to make him a slave."[1]

Aristotle does not admit, however, that Greeks can ever rightfully be made slaves, for to him, as to all Hellenes, the idea was inconceivable that a Greek could fall so low, or that a despised barbarian might mount so high, that the former could rightfully deserve to become the property of the latter. "Among the barbarians," he says, "a female and a slave are upon a level in a community, the reason for which is, that amongst them there are none qualified by nature to govern, therefore their society can be nothing but between slaves of different sexes. For which reason the poets say, 'It is proper for the Greeks to govern the barbarians, as if a barbarian and a slave were by nature one.'"[2]

Quite logically Aristotle declares that slavery cannot properly be founded upon the rights of war even though the war be a just one. For otherwise "just men of the noblest families might happen to be slaves, if they should chance to be taken prisoners in war and sold."[3]

The weakest point in Aristotle's justification of slavery is of course the fact that Nature presents no definite criteria for determining when an individual is qualified only for servitude, and when he is not. This defect becomes all the more evident when it is admitted by Aristotle that while "it is the intention of Nature to make the bodies of slaves and freemen different from each other, these rules do not always take place, for slaves have sometimes the bodies of freemen, sometimes the souls."[4] However, as Newman remarks, Aristotle deserves to be remembered rather as the author of a suggestion for the reformation of slavery than as the defender of it. The slavery he

[1] *Politics*, Bk. I, ch. V.
[2] *Idem*, Bk. I, ch. II.
[3] *Idem*, Bk. I, ch. VI.
[4] *Idem*, Bk. I, ch. V.

defends is an ideal one which can rightfully exist only where the master is intellectually and morally as high as the slave is low. His theory, if applied to conditions as they then existed, and if then put into practice, would have necessitated the freeing of a large proportion of the slaves. Moreover, even where legitimate, Aristotle would have had the relation between master and slave far different from that which it ordinarily has been. According to him, it should be one from which both master and man would derive benefit.

"To govern ill," he says, "is disadvantageous to both, for the same thing is useful to the part and to the whole, to the body and to the soul, but the slave is, as it were, a part of the master, as if he were an animated part of his body, though separate. For which reason a mutual utility and friendship may subsist between the master and the slave; I mean when they are placed by Nature in that relation to each other; for the contrary takes place amongst those who are reduced to slavery by the law, or by conquest."[1]

The Proper Aim of the State

As we have already seen, Aristotle justifies the state as a necessary agent for the securing of men's truest happiness. This, according to him, is an ethical end, and thus leads to the question: In what is man's truest happiness conceived to consist? Shortly speaking, Aristotle conceives this to consist in the complete, rational exercise of one's powers. Happiness is thus a different thing for beings differently constituted. To the plant or to the animal it consists in the simple satisfaction of physical, material needs. To rational men however it means, in addition to this, the proper exercise of all those artistic, ethical, and intellectual faculties which belong to them as the highest products of Nature. By "proper exercise" is meant the employment of these faculties in such a manner

[1] *Politics*, Bk. I, ch. VI.

that the satisfaction of the lower desires are subordinated to the higher, without defect or excess in any case. In other words, a happy life is one that is at once temperate and complete. It means a life governed throughout by reason, and enriched by a great variety of interests. Now, says Aristotle, it is only when organised into a state that men are able to maintain as complex a social order as is thus demanded. And this for three reasons. In the first place it is only through the establishment of a supreme political power that an orderly and peaceful existence is rendered possible. Secondly, it is only in a social and political life that there is furnished that diversity of interests and that variety of life which is essential to the complete life. Thus, in discussing the most desirable size for a state, Aristotle says that while it should not be so large as to render difficult or impossible that civic harmony and unity which is so desirable, it should not be so small as not to create a variety of interests sufficient to stimulate the minds and employ all the possible activities of its citizens. "There is," he says, "a determinate size to all cities, as well as everything else. . . . The best boundary for a city is that wherein the numbers are the greatest possible, that they may be the better able to be sufficient in themselves, while at the same time they are not too large to be under the eye and government of magistrates."[1]

Thirdly, and finally, the state is required for men's happiness in that it is through the education and training which public life affords that there is created in the citizen the ability and the moral disposition to live the good life. Insight, says Aristotle, is necessary for the practice of virtue. Unless men know themselves, that is, recognise their own powers and possibilities, and are taught the evils of intemperance in the indulgence of their own desires, they cannot possibly have either the will or the capacity to live that complete life which alone leads to

[1] *Politics*, Bk. VII, ch. IV.

happiness. Discussing this point in his *Ethics*, he says that there are three agencies through which men attain morality. First, by their natural endowments; second, by intellectual teachings; third, by practice or habituation. To be effective, he goes on to say, this habituation should be continued throughout life, and to render possible such a prolonged training there is needed a power that is at once reasonable and has the authority to command.

The state then is with Aristotle, as it is with Plato, in large measure an educational institution. Its fundamental aim is, or should be, the development of the ethical and intellectual natures of its citizens, — to render possible a rational life, and to dispose men to lead it. "Since we have determined," he says, "that the virtue of a good citizen and good governor is the same as of a good man, and that every one before he commands should have first obeyed, it is the business of the legislator to consider how his citizens may be good men, what education is necessary for that purpose, and what is the final object of a good life."[1]

Again, he says: "The first care of him who would found a city truly deserving that name and not nominally so, must be to have his citizens virtuous, for otherwise it is merely an alliance for self-defence. . . . A city is not a community of peace, nor established for the sake of mutual safety or traffic with each other, but that these things are the necessary consequences of a city, although they may still exist where there is no city; but a city is a society of people joining together with their families and their children to live agreeably for the sake of having their lives as happy and as independent as possible. . . . It is not therefore founded for the purpose of men merely living together, but for their living as men ought."[2]

Another quotation bearing upon the same point is as follows: "Reason indeed concurs with experience in

[1] *Politics*, Bk. VIII, ch. XIV.
[2] *Idem*, Bk. III, ch. IX.

showing that all the attention which a legislator pays to the business of war, and all other rules which he lays down, should have for their object rest and peace, since most of those states which we usually see are preserved by war, but after they have acquired a supreme power over those around them are ruined; for during peace, like a sword, they lose their brightness; the fault of which lies in the legislator, who never taught them how to be at rest."[1]

In still another place he says, "A city is a community of equals for the purpose of enjoying the best life possible."[2]

It is at this point that Aristotle, in the advice which he gives, departs from the actual practice of his own city. Like Plato he would have introduced the Spartan idea of public and compulsory training. A full account of the educational system that he would desire is promised, but whether prepared or not, only an introductory fragment of such a statement has come down to us.

The Proper Sphere of the State

The sphere of activity which Aristotle accepts as properly belonging to the state, is naturally indicated by the end which he sets to it. This end being, as we have seen, the very general one of making men virtuous and happy, it of necessity follows that he ascribes no limits to the legitimate exercise of political power. In this Aristotle does not differ from Plato. When he comes to the determination of the exact duties which it would be wise for the state to undertake, he, however, differs widely from his teacher. Especially he objects to the communistic features of the *Republic;* but he does so not upon the ground that there are certain private interests and activities which it is not right that the state should control, but because he believes that, in the matters under consider-

[1] *Politics*, Bk. VII, ch. XIV. [2] *Idem*, Bk. VII, ch. VIII.

ation, it would not be advantageous either to the state or to its citizens to subject them to public regulation.

Because of his general metaphysical doctrines Aristotle was inclined to view the relation of the individual to the state in a light different from that in which Plato regarded it. Aristotle defines philosophy as the "science of universals." He thus agrees with Plato that it has to do with realities as distinguished from appearances. Its sole aim is the determination of general concepts or ideas, not the ascertainment of special truths. He thus maintains that a true knowledge of a thing is gained only when one has a clear apprehension of the abstract idea which it illustrates or exemplifies. True knowledge, therefore, is obtained not through the senses, but by thought.

To Aristotle reality consists in "form" rather than in "matter." But this "form" he conceives as an entity or concept which cannot exist apart from the particular things in which it is embodied. The Platonic theory which gives to ideas an independent existence he denies. Substance and idea, or matter and form, to use his terms, he asserts are metaphysically distinct yet mutually complementary. Neither exists without the other. Thus, as Zeller lucidly explains it: "While the general principle upon which the Platonic idealism is founded is thus retained, the special development of it into the doctrine of ideas is rejected. The 'Idea' which Plato had conceived of as transcendental and supersensible, has a new place assigned to it as the formative and efficient principle in the phenomenal world. As the inner essence of things, it is sought for in the facts themselves, as they present themselves to us in experience. . . . While all parts of the world down to the most imperfect and insignificant are (to Aristotle) essential elements in the whole, still the definite and peculiar character of each has a claim upon our regard, and accordingly it is not less in harmony with the demands of the system than with the personal inclinations of its author to investigate great

things and small alike with scientific thoroughness, and to treat nothing with contempt, as if it were insignificant and worthless for science." [1]

The reflection of Aristotle's metaphysics in his politics is quite clear. It cannot exactly be said that, like Plato, he views the state as a "universal" man; yet, as we have seen, he does place the idea of the state logically prior to that of the individual. He thus, in effect, gives to the individual a moral or personal significance only as he is a member of a political whole. But, after all, this is so only because a political existence is necessary to men for the full employment of their faculties. The state still remains but a means to an end, and that end the highest welfare of the individual citizens. This idea Aristotle ever keeps clearly in view. As in his metaphysics there is no such thing as a universal separate from its particulars, so, however abstractly the idea of man is conceived, there never comes into his thought the notion that humanity has any form of existence higher than that which is embodied in individual human beings. He is therefore never tempted in his political philosophy to make the good of the social whole an end in itself, and as such, one to which private interests may rightfully be sacrificed. Since human reality is manifested only in individual men, the highest human good is only realisable in and through them. A social good cannot therefore be anything else than the aggregate of the several goods of a number of persons.

Aristotle's ideal state thus becomes one in which the citizens are severally enabled to live a complete life, — to satisfy within due limits all those general desires which Nature herself implants in the human breast. The state is thus not to restrict or in any way to do violence to men's nature, but to supply in the fullest possible manner the opportunity for its development.[2] This means that a very con-

[1] *Aristotle and the Earlier Peripatetics*, Eng. transl., Vol. II, p. 336.

[2] The citizen is not, however, says Aristotle, to be allowed to follow any trade or employment which is "ignoble and destructive of virtue"

siderable amount of individual liberty should be left to the citizen. Though men resemble one another in all those qualities which characterise them as rational moral beings, they differ widely among themselves as regards special aptitudes and dispositions. For their happiness and for the best development of their powers, they therefore require a certain freedom of choice as to the manner in which they are to conduct their lives.

This general attitude of Aristotle's mind toward the individual is well illustrated in the criticism which he passes upon the communistic features of Plato's ideal republic. Aristotle recognised as clearly as did Plato that unity is an essential element in any ideal polity. "I am willing," he says, "to agree with Socrates [Plato] in the principle from which he proceeds, and admit that a city ought to be as one as possible."[1] But he was not willing to admit that that sort of unity which Plato sought was absolutely desirable, or that the means which he suggested were calculated to attain it. Unity is desired, he says, but not at the expense of the completeness of life of the individual citizens. Affection for the city is to be obtained not by crushing out all individual interests until nothing is left to dispute with the public welfare for a place in the desires of men, but by providing for the citizen an environment in which he will be able to satisfy all his rational and special needs. Thus Aristotle especially objects to that impoverishment of men's lives which would result from the abolition of family ties and private property interests.

In the first place, he says, the destruction of the private virtues which such a community of life would occasion would not be replaced by any public ones. "For what is common to many is taken least care of, for all men regard more what is their own than what others share with them

(*Politics*, Bk. VII, ch. IX). In agreement with general Greek thought this is construed to bar him from engaging in any commercial or mechanical pursuit.

[1] *Politics*, Bk. II, ch. III.

in, to which they pay less attention than is incumbent on every one ; let me add also that every one is more negligent of what another is to see to, as well as himself, than of his own private business. . . . Let each citizen then in the state have a thousand children, but let none of them be considered as the children of that individual, and let the relation of father and child be common to them all, and they will all be neglected." [1] And a little later on he adds : "We think that friendship is the greatest good that can happen to any city, as nothing so much prevents seditions. . . . But, in a city which admits of this community the tie of friendship must, from that very cause, be extremely weak, when no father can say, this is my son ; or son, this is my father. . . . There are two things which principally inspire mankind with care and love of their offspring, knowing it to be their own, and what ought to be the object of their affection, neither of which can take place in this sort of community." [2]

As regards community of property he says : "It is evident then that it is best to have property private, but to make the use of it common. It is unspeakable how advantageous it is that a man should think he has something which he may call his own : for it is by no means to no purpose that each man should have an affection for himself. . . . Besides it is very pleasing to us to oblige and assist our friends and companions, as well as those whom we are connected with by the rights of hospitality ; and this cannot be done without the establishment of private property, which cannot take place with those who make a city too much one ; besides they prevent every opportunity of exercising two principle virtues, modesty and liberality. Modesty with respect to the female sex, for this motive requires you to abstain from her who is another's : liberality, which depends upon private property, for without that no one can appear liberal or do any generous action." [3]

[1] *Politics*, Bk. II, ch. III. [2] *Idem*, Bk. II, ch. IV.
[3] *Idem*, Bk. III, ch. V.

In the second place, says Aristotle, even if desirable, the harmony of interests and absolute civic allegiance which Plato seeks will not be obtained through the means which he suggests. Unity will not result, for: "In one city there must of necessity be two, and those contrary to each other; for he makes the military the guardians of the state, and the husbandmen, artisans, and other citizens, and all those quarrels, accusations, and things of the like sort, which he says are the bane of other cities, will be found in his also." [1] Civic love also will not be increased, for by rendering life less complete and therefore less valuable to the citizen the motive for the maintenance of the social order in which he lives will be proportionately weakened.

From what has been said it will be seen that Aristotle differs from Plato regarding the extent of the state's control over the private affairs of the citizen simply upon grounds of expediency. As little as Plato, does Aristotle have the idea that there belongs by Nature to individuals certain spheres of freedom upon which it is never legitimate for the political power to trespass. To him, as to all the ancients, the absolutism of the state is unquestioned. Men are to be made virtuous and happy no matter what degree of interference in their lives on the part of the state this implies. The individual is not conceived as having any rights, or indeed as being a person at all outside of the civil body.

Besides the influence upon his views as to the extent to which the control of the state should be extended over the private life of the citizen, there is seen one other effect of Aristotle's metaphysical doctrines upon his political theories. Whereas Plato in effect gives to the civic state a value and significance only as a preparation for another and more perfect life in which philosophical activities alone shall occupy the attentions of men, Aristotle, with his less transcendental views, looks upon political life as

[1] *Politics*, Bk. II, ch. V. Upon this point see *supra*, p. 113.

having for its citizens an immediate and present value. Its entire and final purpose is to provide, here and now, a happy and complete life for its citizens. The rulers of the state are to live in the midst of the every-day practical affairs of government and are to find their highest enjoyment in the proper performance of the administrative duties that are laid upon them. They are not, as are the philosopher rulers of the Platonic republic, to live remote from earthly affairs and to spend their time in the contemplation of that world of ideas of which they alone have been permitted to gain a glimpse.[1]

Citizenship

Aristotle's conception of citizenship is a less democratic one than that of Plato. It is a conspicuously higher one. Plato, it will be remembered, had described as citizens the great passive, uneducated, unpolitical demos of his city. To Aristotle this appears essentially wrong. To be an integral part of the political whole, the individual should, he thinks, participate actively in its public life. He should be qualified for, and allowed the exercise of, political duties. Thus he defines a citizen as one "who has a right to share in the judicial and executive part of govern-

[1] Aristotle's criticism of Plato is not always fair. "These defects stand out far more forcibly when he treats of the State described in Plato's *Laws*. Upon this criticism we cannot pronounce a judgment by any means so favourable; indeed it contains some things which are all but incomprehensible. Even the refutation of community of goods has not altogether that full cogency derived from the essential motive of the case, which is apparent in the refutation of the community of wives and children. As we see from this criticism and yet more clearly from that upon Phaleas, Aristotle is himself in favour of considerable restrictions upon the rights of property. Every difference of principle in this respect between his own ideal State and Plato's in the *Laws* disappears. When all things are taken into account Aristotle is no further removed from Plato's first ideal State in the one, than Plato in the other. Here, therefore, Aristotle's criticism can only affect what are relatively subordinate points, and under these circumstances it frequently assumes a petty and generally unfair character." Süsemihl and Hicks, *Politics of Aristotle*, p. 33.

ment in any city. . . . A city is a collective body of such persons, sufficient in themselves to all the purposes of life." [1]

Government

There can be no doubt but that Aristotle had a clear conception of the distinction between the two ideas conveyed by the terms *State* and *Government*, — a distinction so essential to clearness of political thought, and one upon which modern writers lay so much stress. "The form of government," he says, "is the ordering and regulating of the city, and all the offices of it, particularly those wherein the supreme power is lodged." [2] The state, on the other hand, as we have seen, he defines as "the collective body of the citizens, sufficient in themselves to all the purposes of life."

This distinction between state and government Aristotle utilises throughout his work. Thus he carefully separates the discussion of the best form of government from his consideration of the ideally best state. In the one case he inquires into the problem of properly distributing the political powers among the state's several administrative organs; in the other, he seeks to determine the elements that should be present in the composition of the state itself, — its geographic situation, its climate, character of soil, number of citizens, their character, etc.

The theory of the separation of powers also finds a place in Aristotle's thought. "Now there are three things in all states," he says, "which a careful legislator ought well to consider, which are of great consequence to all, and which properly attended to the state must necessarily be happy; and according to the variation of which the one will differ from the other. The first of these is the public assembly; the second, the officers of the state, that is, who they ought to be, and with what powers they should be intrusted, and in what manner they should be

[1] *Politics*, Bk. III, ch. I. [2] *Idem*, Bk. III, ch. VI.

appointed; the third, the judicial department. Now it is the proper business of the public assembly to determine concerning war and peace, making or breaking of alliances, to enact laws, to sentence to death, banishment or confiscation of goods, and to call the magistrates to account for their behaviour when in office."[1]

Aristotle then goes on in like manner to ascribe the proper duties to the executive offices and to the courts of law. One thing that strikes the modern democrat as unusual is that the duty of electing officers is described as belonging naturally to the assembly. But even this is seen to be not so different in theory from the practice of to-day, when it is remembered that the Greek assembly was not a representative body, but a gathering of the entire electorate itself. Election by the assembly was, therefore, election by the people.

Aristotle's Classification of Governments

As a preliminary to the examination of the art of governing, Aristotle is led to make his famous analysis of the classes into which the different forms of political organisation may be grouped. His was not the first attempt at such a grouping of political types, but resulted in a much more careful and exact ordering than had previously been reached, and fixed the answer to the problem in a form in which it was to remain without substantial modification until the present day.

The division of governmental forms into three classes according as the controlling power was in the hands of one man, a few men, or all, had been early made. In a very general way we find this classification made when Pindar speaks of "tyranny, the ravening host, and the wise wardens of the city." By the time of Herodotus the terms μουναρχίη, τυραννίς, ὀλιγαρχίη, are apparently in general use.[2]

[1] *Politics*, Bk. IV, ch. XIV.

[2] *Pyth.* II, 86. Cf. Whibley, *Greek Oligarchies: Their Character and Organization*, p. 1. In this work Mr. Whibley has made a most excel-

The forms which Herodotus describes in the debate which he reports to have been held by the conspirators after the death of the Magi are not the same as those which later appear in Greek political thought under the names monarchy, aristocracy, and democracy. The division of Herodotus is one based simply on the formal or apparent locality of the controlling power without any reference to where, in fact, it may actually lie. Monarchy he defines as the rulership of one man according to his individual will, and without responsibility to any other authority ; no distinction is made as to whether or not his title to office rests upon legal grounds, or whether, in the exercise of his powers, he seeks to satisfy selfish interests or to secure the welfare of his people. The rulership of the few is described as that of an oligarchy or legal aristocracy. The third or democratic form is termed *isonomy*, and is defined as one in which public officials are elected by lot, and limited in their authority by the right of the whole people to pass upon all the more important public matters.[1]

Thucydides, though not led at any point to attempt a formal classification of constitutions, exhibits throughout his history a clear appreciation of the natures and relative merits of the different prevailing forms of political control. He shows himself acquainted not only with the three main types but with the varieties of those types.[2]

lent study of the various terms used in Greek literature as descriptive of different governmental forms ; and in the paragraphs which immediately follow liberal use has been made of material thus afforded. See also Cope, *Introduction to Aristotle's Rhetoric*, pp. 208–212.

[1] III, 80–83. Recommending isonomy, the conspirator Otanes says: "There, places are given by lot, the magistrate is answerable for what he does, and measures rest with the commonalty" (Eng. transl. by Rawlinson). Commenting upon the meaning of the word *isonomy* Rawlinson says: "Modern languages have no single word to express the Greek isonomy, which signifies that perfect equality of all civil and political rights which was the fundamental notion of the Greek democracy."

In VI, 43, Herodotus uses δημοκρατίη to indicate the popular form.

[2] I, 13 ; III, 62. See also his descriptions of the Athenian and Syracusan democracies (II, 38 ; VI, 39). Cf. Whibley, *op. cit.*, 3.

"In these respects," says Whibley, "he anticipates Aristotle, and it is clear that the philosopher to a great extent follows the historian both in his phraseology and in his general descriptions. To Thucydides the Peloponnesian War was a conflict of political principles, a duel between oligarchy and democracy; it was even more particularly a trial of strength between the free and popular constitution of Athens and the rigid, military aristocracy of Sparta."[1]

Plato's classification of governments has already been discussed.

Aristotle's classification as given in his *Ethics* and *Politics* is similar in a number of respects to that of Plato, but is more definitely stated and the characteristics of each form are more fully described.[2] In his *Ethics* he tells us: "There are three forms of civil government and as many deflections, which are, as it were, corruptions of them. The former are monarchy, aristocracy, and a third, on the principle of property which it seems appropriate to call a timocracy. . . . The deflection from monarchy is tyranny; for both are monarchies, but there is the greatest difference between them, for the tyrant looks to his own benefit, the king to that of his own subjects. . . . The transition from aristocracy is to oligarchy, through the wickedness of those in power, who distribute the offices of state without reference to merit, give all or most good things to themselves, and the offices of state constantly to the same people, setting the highest value upon wealth; consequently a few only are in power, and the bad instead of the best. The transition from timocracy is to democracy; for they border

[1] *Op. cit.*, p. 5. Isocrates (XII, 132–133), Æschines (*Timarch*, 4), and Demosthenes (XXIII, 66; XXII, 51; XXIV, 163) each refer to these three main governmental forms, and to some extent discuss their relative merits. For Socrates's classification see Xenophon's *Memorabilia*, IV, 6, 12. *Vide* Whibley, p. 6.

[2] In his *Rhetoric* (I, 8), Aristotle gives a classification which varies from that given in his *Politics* and *Ethics*, and is quite similar to that reported by Xenophon as Socratic.

upon one another, since a timocracy naturally inclines to be in the hands of the multitude, and all who are in the same class as to property are equal."[1]

In his *Politics* Aristotle substantially repeats this classification when he says: "We usually call a state which is governed by one person for the common good a monarchy, one that is governed by more than one, but by a few only, an aristocracy. . . . When the citizens at large govern for the public good, it is called a polity which is also a common name for all other governments.[2]

"A kingdom may degenerate into a tyranny; an aristocracy into an oligarchy; and polity into a democracy. Now a tyranny is a monarchy where the good of one man only is the object of government;[3] an oligarchy considers

[1] *Op. cit.*, Bk. VIII, ch. X. *Vide* also Bk. VIII, ch. XI.

[2] In the broad sense in which Aristotle employs the word *polity* it describes all forms of government other than monarchy or tyranny. In its limited sense, "polity" is really a moderate democracy, a link between democracy and aristocracy. It is to be a rule in which the moderately wealthy, in fact a minority of the full citizens, are to rule. Cf. Whibley, *Greek Oligarchies*, pp. 22–24.

[3] "The meaning conveyed by the word [tyrant] to the Greek mind of a later age was that of a man who wielded an absolute authority, which was not sanctioned by the ordinances of the State in which it was exercised. Absolutism and irresponsibility are the chief connotations of the word. To the citizen of a later age the tyrant was an outlaw in a threefold sense. He had placed himself outside the pale of positive law; for this reason he seemed exempt from all moral control, and, as an equally necessary consequence, was outside the protection of the law. It was this idea of irresponsibility, of being above the ordinances of the state which above all shocked Greek sentiment, and gave rise to the gloomy generalisations as to the character and conduct befitting such a position with which the readers of Herodotus are familiar. We need only note in passing the gratuitous addition to this conception developed by the later philosophic thought of Greece: namely, that the rule of the tyrant was exercised not in the interest of the subject, but in that of the ruler. It forms the chief ground for Aristotle's distinction between monarchy and tyranny, and was a natural consequence of the idea that the latter government was outside the pale of the law; but it was a deduction not always justified by the facts. Historians must judge by results and not by motives; and few governments in Greece betrayed such a keen interest

only the rich; and a democracy only the poor, but neither of them have a common good in view."[1]

So far as the general distribution of governments into three general orders is concerned, it would appear from the foregoing quotations that the number of persons in possession of the controlling power in the state is accepted by Aristotle as the classifying principle. Later on, however, we find that this is made merely the test for distinguishing between monarchy and the other forms of rule. When we come to the question of separating aristocracies from "polities" (in the stricter sense) we find that the distinguishing element is that of wealth. Aristocracy is the rule of the well-to-do; polity the rule of the poor. As Aristotle says, the former will almost inevitably be in the minority and the latter in the majority, yet this is but accidental, not essential. "Since in all countries there are many poor and few rich, it is not, therefore, the cause that has been already assigned (namely, the number of people in power) that makes the difference between the two governments; but an oligarchy and a democracy differ in this from each other in the poverty of those who govern in the one, and the riches of those who govern in the other; for when the government is in the hands of the rich, be they few or be they more, it is an oligarchy; when it is in the hands of the poor, it is a democracy, but as we have already said, the one will be always few, the other numerous."[2]

In accordance with the above we find that in fact Aristotle gives only an incidental attention to the classification of governments so far as it is based upon the number in

in the welfare of their cities as these unauthorised monarchs." Greenidge, *Greek Constitutional History*, p. 27.

It should be observed that Aristotle is not always consistent in the use of the word *tyranny*, using it sometimes to indicate an oppressive and at other times an unconstitutional government.

[1] *Politics*, Bk. III, ch. VII.

[2] *Idem*, Bk. III, ch. VIII. To practically the same effect, see Bk. IV, ch. IV.

power, and devotes himself especially to the analysis of existing states with the aim of determining what classes have in them the actual preponderance of power, and, based upon this determination, the laying down of the principles in accordance with which their respective polities should be governed.

The distinction which Aristotle makes between normal and perverted political types is sufficiently plain. The broad test which assigns a given government to the one or the other of these two classes is whether the public policies are controlled by the interests of those in power or by the demands of public welfare. Thus the following definition of a just government is given: "All those governments which have a common good in view, are rightly established and strictly just; but those which have in view only the good of the rulers, are all founded on wrong principles and are widely different from what a government ought to be, for they are a tyranny over slaves, whereas a city is a community of free men."[1]

[1] *Politics*, Bk. III, ch. VI. It will be remembered that the distinction between Plato's normal and perverted governments was the observance or non-observance of law.

Newman (*Politics of Aristotle*, III, p. xxviii) criticises Aristotle's classification as follows: "It is open to objection on more grounds than one. In the first place it leaves out of sight that the one, few, or many, or two of them may share supremacy. . . . These constitutions will be partly normal and partly deviation forms: they do not, therefore, fall under any of the six heads, thus the classification is not exhaustive. Again, we can conceive the existence of constitutions under which rule is exercised for the advantage of the rulers, and yet for the common advantage, or partly for one end, partly for the other. These also fall outside of the classification. And then again we might ask whether a constitution, which, while it aims at the common advantage, takes a low view of that common advantage, construing it, for instance, as the acquisition of wealth or empire, should not also be treated as a distinct constitution from one which seeks the common advantage and studies it in a nobler way. . . . But in fact Aristotle tends on fuller consideration to rest the distinction between constitutions, not on the number of rulers or the aim with which they rule, but rather on the attribute — virtue, wealth, free birth, etc. — which they raise to supremacy. Even this basis of classification, however, proves hardly satisfactory, for the absolute kingship and

Within each of the six general classes of government Aristotle finds and describes different types according as this or that class of the population has the paramount power, or this or that principle has controlling influence in the selection and execution of the policies of the state. In this part of the work the analyses are not always clear. The observations and deductions are almost uniformly sane and edifying, but the principles governing his classifications are often confused.[1]

Aristotle recognises the possibility of mixed forms of government, that is to say, of types of state organisation in which elements from several distinct kinds of government are found. His ideal polity is indeed, as we shall presently see, a mixed form. The modern doctrine, based upon the Austinian definition of sovereignty, that a mixture of monarchy with aristocracy or democracy is a logical impossibility, could not have had any place in his thought. For the idea that sovereignty is indivisible and must finally be possessed by some one organ of the state, is itself founded upon that doctrine which ascribes to the state a supreme law-making power, and identifies sovereignty with it. Because a will is necessarily a unit, this legislative power, it is argued, must be an indivisible whole. But, as we have already learned, the Greeks did not by any means make the enactment of laws the highest function of the state. To them, therefore, political sov-

the true aristocracy raise the same attribute — fully equipped virtue — to supremacy, and oligarchy and tyranny both do homage to wealth. Yet Aristotle distinguishes between the absolute kingship and the true aristocracy and also between oligarchy and tyranny." Cf. Whibley, *Greek Oligarchies*, pp. 10–15, and Sidgwick, *The Elements of Politics*, ch. XXX.

[1] "There can be no doubt," says Professor Dunning in a very able article upon "The Politics of Aristotle" (*Political Science Quarterly*, XV, p. 292), "as to the success of the philosopher in detecting the broad underlying influences, historical, social and economic, through which the manifold variety in political organisation is determined. It is his realization of the diversity in these influences that leads him more or less unconsciously to shift from time to time the basis of his classification."

ereignty so far as that idea was conceived at all, was viewed as practically exhausted in the executive and administrative functions of the government.

Aristotle's Ideal Polity

Aristotle was a severely scientific writer and pursued in the main in his political writings the inductive method. Of the considerable collection of Greek constitutions which he made as a preparation of his *Politics*, we have already spoken. But aside from his naturally practical turn of mind his theory of virtue was such as tended to restrain him from indulging in such fanciful speculations as had characterised the thought of Plato.

According to Plato virtue was the opposite extreme of vice. According to Aristotle, on the other hand, virtue is to be interpreted in the terms of a golden mean. Thus courage is defined as lying between foolhardiness and timidity; and rational pleasure as being neither asceticism nor excessive indulgence. In like manner political perfection is sought in a polity in which no principles are pushed to their utmost limits. In the first place Aristotle is well aware of the fact that, in order to secure the best results, political arrangements need always to conform to the characters and requirements of the peoples to be organised under them. An absolutely ideal polity, therefore, is realisable only under ideal conditions. Taking, then, human nature as it is, and political conditions as they actually exist at any given time and place, political perfection is not to be sought for, but only that excellence which is, under the circumstances, practically attainable.

"Every legislator," Aristotle says, "ought to establish such a form of government as from the present state and disposition of the people who are to receive it, they will most readily submit to, and persuade the community to partake of."[1] And again, "It may happen that although

[1] *Politics*, Bk. IV, ch. I.

the form of government may be better than another, yet there is no reason to prevent another from being preferable thereunto in particular circumstances and for particular purposes."[1]

Finally, as a sort of conclusion to his examination of the various merits and deficiencies of the different forms of government which he had been studying, Aristotle, in the eleventh chapter of the fourth book, undertakes to state the form of political organisation which he can most highly recommend to his countrymen. "We proceed now to inquire," he says, "what form of government is best for communities in general, not adapting it to that superior virtue which is above the reach of the vulgar, and that education which every advantage of Nature and fortune only can furnish, nor to those imaginary plans which may be formed at pleasure, but is that mode of life which the greater part of mankind can attain to, and that government which most cities may establish."[2]

Such a government as this, he goes on to declare, must find its excellence and its stability not so much in its absolute merits as in the correspondence of its requirements with the mediocre morals and intelligence of the generality of its citizens. "For if," he continues, "what I have said in my last treatise on morals is true, a happy life must arise from an uninterrupted course of virtue; and if virtue consists in a certain medium, the middle life must certainly be the happiest; which medium is attainable by every one. The boundaries of virtue and vice in the state must also necessarily be the same as in a private person; for the form of government is the life of the city. In every city the people are divided into three sorts: the very rich, the very poor, and those who are between them. If this is universally admitted that the medium is the best, it is evident that even in point of fortune mediocrity is to be preferred, for that state is most submissive to reason;

[1] *Politics*, Bk. IV, ch. II.

[2] *Loc. cit.* The reference here to Plato's *Republic* is evident.

for those who are very handsome, or very strong, or very noble, or very rich, or, on the contrary, those who are very poor, or very weak, or very mean, with difficulty obey it [Reason]; for the one are capricious and greatly flagitious, the other rascally and mean, the crimes of each arising from their different excesses; nor will they go through the different offices of the state, which is detrimental to it; besides those who excel in strength, in riches or friends, or the like, neither know how nor are willing to submit to command. . . . As for the very poor, their general and excessive want of what the rich enjoy reduces them to a state too mean; so that the one know not how to command, but to be commanded as slaves; the others know not how to submit to any command nor to command themselves but with despotic power. A city composed of such men must, therefore, consist of slaves and masters, not freemen; where the one party must hate and the other despise; where there could be no possibility of friendship or political community. . . . It is plain, then, that the most perfect political community must be among those who are in the middle rank, and those states are best instituted wherein these are a larger and more respectable part, if possible, than both the others."[1]

Further describing his ideal Aristotle declares that a state should be of a comparatively small territory, and with a population limited in number. All citizens, he says, should be if possible acquainted with one another, and should take a personal, active interest in public affairs.

Above all, as a matter of expediency as well as of right, absolute distributive justice should prevail. By this is meant that those should rule who by education and natural capacity are qualified for leadership; and economic goods should be so apportioned as to avoid extremes of wealth and poverty and yet allow to the ruling class a sufficient leisure and freedom from care.

[1] *Politics, loc. cit.*

Writing at the time that he did Aristotle was evidently greatly impressed by the internal feuds by which he saw the city-states of his country distracted. Thus he devotes practically an entire book of his *Politics* to an examination of the causes of and the ways of avoiding these civic dissensions. "It remains that we next consider," he says, "from what causes and how alterations in governments arise, and of what nature they are, and to what the destruction of each state is owing; and also to what form and polity it is likely to shift into, and what are the means to be used for the general preservation of governments, as well as what are applicable to any particular state; and also of the remedies which are to be applied either to all in general or any one, considered separately, while they are in a state of corruption." Then follows a masterly diagnosis of contemporaneous political diseases.

The real source of sedition Aristotle finds in a lack of correspondence between the abilities and political deserts of the different classes of citizens, and the actual influence allotted to them by law in the administration of public affairs. Where this discrepancy is at all great, a feeling of injustice inevitably arises, which, when it becomes sufficiently acute, necessarily leads either to covert plotting against, or open resistance to, the existing government. "The only firm state is that where every one enjoys that equality he has a right to, and fully possesses what is his own."[1] The great desideratum in practical politics is, therefore, the proper apportionment of political power among the several classes of the population. Compared with this requirement, all details of governmental organisation are unimportant. "Now that cause," he says, "which of all others most universally inclines men to desire to bring about a change in government, is that which I have already mentioned; for those who aim at equality will be ever ready for sedition, if they see those whom they esteem their equals possess more than they do, as

[1] *Politics*, Bk. V, ch. VII.

well as those who are not content with equality, but aim at superiority if they think that while they deserve more than, they have only equal with, or less than, their inferiors."[1]

The above principle is stated in another way, when Aristotle says that political stability can only be secured when those who have an interest in maintaining the existing state of things are more numerous or more powerful than those who might gain from a change. "As a general maxim," he declares, "that party which desires to support the actual administration of the state ought always to be superior to that which would alter it."[2] In accordance with this principle a democracy is best where the people are generally poor, an aristocracy where the wealthy are very powerful, a monarchy where the citizen class as a whole is incompetent to rule and disposed to passive obedience. In one place, indeed, Aristotle says that were it possible to secure a single individual whose merits greatly transcended those of all other citizens, royalty would be the ideal type.[3] Aristotle is, however, careful to say that such a "natural" ruler has probably not existed in any state since the Heroic Age. In default, then, of such a chief, the choice in governmental forms is practically one between aristocracy and democracy.

Upon general principles Aristotle is inclined to favour as wide a distribution of political powers as is possible. He shows himself well aware of the advantages to be obtained by extending authority to all who by virtue or capacity are qualified properly to exercise it. For thus, he says, not only is sedition rendered less likely, but a collective wisdom is secured which is in many cases superior to that possessed by any one citizen. This confidence in the *vox populi*, Aristotle justifies as follows: "If the people are not very brutal, although we allow that each individual knows less of those affairs than those who have given particular attention to them, yet when they come

[1] *Politics*, Bk. V, ch. II. [2] *Idem*, Bk. IV, ch. XII.
[3] *Idem*, Bk. III, ch. XVII.

together they will know them better, or at least not worse. Thus he who builds a house is not the only judge of it, for the master of the family who inhabits it is a better; thus, also, a steersman is a better judge of a tiller than he who made it, and he who gives an entertainment than the cook."[1]

However, Aristotle says this doctrine is not to be pushed to an extreme. Though, as he declares, in every state it is "necessary that the free men who compose the bulk of the people should have absolute power in some things," nevertheless, "as they are neither men of property nor act uniformly upon principles of virtue, it is not safe to trust them with the first offices of the state, both on account of their iniquity and their ignorance. . . . Yet it is dangerous to allow them no power or share in the government, for when there are many poor people who are incapable of acquiring the honours of their country, the state must necessarily have many enemies in it; let them, then, be permitted to vote in the public assemblies and to determine causes. . . . The supreme power should be lodged in laws duly made and the magistrate or magistrates, either one or more, should be authorised to determine those cases which the laws cannot particularly speak to, as it is impossible for them, in general language, to explain themselves upon everything that may arise."[2]

In the above-quoted passage we find what is, perhaps, the most definite statement which Aristotle has given us of his ideal polity; that is, the polity which, generally speaking, he thinks is to be preferred. It is plainly a mixed type, one in which oligarchic and democratic elements are united. Indeed, as Aristotle elsewhere says: "A free state [polity] is nothing more than a mixture of them [oligarchy and democracy]. As there are three things which claim an equal rank in the state, freedom, riches, and virtue, . . . it is evident that the conjuncture of the rich and poor make up a free state."[3]

[1] *Politics*, Bk. III, ch. II. [2] *Idem*, Bk. III, ch. II.
[3] *Idem*, Bk. IV, ch. VIII.

It is evident from what has gone before that, while Aristotle's democratic preferences are fairly pronounced, he is by no means a believer in what is known in modern times as the doctrine of popular sovereignty, with its premises of the natural equality of all men, the absolute rights of numerical majorities, and the justification of the right of the state upon the basis of the consent of the governed. Contrary to these assumptions, Aristotle holds that the state's authority is founded upon natural law, and that men are so fundamentally unequal that the relations between master and slave, ruler and ruled, clearly must have been intended by the great creator of all things. To be sure, Aristotle holds that all citizens should be allowed to participate actively in the assemblies and courts of law, but this is advised only as a rule of expediency for avoiding popular discontent and possible revolution. Where he recognises public powers as belonging of right to individuals, it is always upon the ground that they are properly qualified to exercise them. Furthermore, the democratic feature of thus giving to all citizens a voice in the discussion of public affairs and in the decision of lawsuits is greatly lessened by the two facts that in the first place the assemblies are not thought of as having general legislative power, and, in the second place, that the whole citizen body is never conceived of as constituting more than a fraction of the entire population. Aristotle's highest conception of a state is, as we have already learned, one in which there is a large slave class by whose labour the members of the citizen class are supplied with the necessities of life and thus enabled to devote their entire energies to public matters.

Aristotle's Economic Views

The special aim of our history scarcely requires us to enter into the particulars of Aristotle's economic views. Speaking generally, however, it may be said that in com-

mon with his contemporaries, he has a general contempt for those who employ their time in the production and accumulation of wealth. That industrials must exist in any society he, of course, recognises, but he maintains that this class should be exclusively composed, if possible, of slaves and other non-citizens. His political ideals require that those who engage in public affairs should be freed from the care, and, as he thinks, the debasement, of economic toil. A quotation from the admirable work of Bonar, *Philosophy and Political Economy*, will sufficiently serve the purpose of our work in displaying the point of view from which not only Aristotle, but Plato and the Greeks generally, considered industry and commerce.

"No doubt," says Bonar, "there was here a general prejudice of Greek philosophers [against commerce and industry] due partly to the idea that an artisan's work unfitted him for military service, partly to the association of it with the labour of slaves, and partly to the fact that many of the industrial arts were introduced by foreigners. The same prejudice existed among the Persians, and has probably prevailed more or less among all warlike nations at a certain stage of development. Socrates, the son of an artisan (stone-mason) rose above it, and it was perhaps dying out at Athens in Plato's time. It was a common taunt of the critics of democracy that democracies admitted artisans and shopkeepers to the government of the state. They never forgot that Cleon was a tanner and Agoracritus a sausage seller. In Plato, however, the prejudice against shopkeepers and merchants is much stronger than against the artisan. He grudgingly allows that division of labour seems to require them; but he thinks that, even on the strength of this principle, only the physically weakest men, unable to do anything else, should take up such work. They were at the best a necessary evil. Their trades were under the strongest of temptations to the accumulation of wealth in private hands; and gold and silver money, by facilitating trade, facilitated

this accumulation. Money-making as an end in itself is to Plato an unmixed evil. An art, especially of a high degree of skill, such as the physician's, ought (he thinks) to be practised disinterestedly from an eye to the ideal of the art itself, not from an eye to the fortune it may bring. To turn an art into a trade is, he says (in the first book of his *Republic*), to add to it the art of money-making. He condemns usury with equal emphasis; he excludes it, in the *Laws*, from the ideal city described there, allowing only an exception in its favour in the case of a customer who does not promptly pay for the work that has been duly executed to his order, and who must after a certain time pay interest as well as the sum due. Finally, he thinks he can prevent most of the abuses of money-making, money-lending, and trading by decreeing that gold and silver money shall never be private property, and the only currency shall be a small change, of the nature of token money. He would also be glad if he could taboo private property also, which he thinks to be the main root of the evil. In his perfect ideal city (*Republic*), as distinguished from his practicable ideal (of the *Laws*), he had forbidden to the guardians both private property in general and gold and silver money in particular."[1]

Turning then to Aristotle's economic doctrines, Bonar shows that this philosopher's idea of a perfect life necessarily placed industrial activities upon a relatively low plane. The highest life, he says, is one in which the individual, freed from all material cares, is enabled to devote the entire energies of his mind to philosophic contemplations. Such a life as this is more to be desired than even that of a good citizen. But even the citizen requires, as we have seen, freedom from economic toil.

In the first book of his *Politics* Aristotle admits that industry and trade are necessary. He even goes on to show how, as the family develops into the state, the principle of the division of labour must be applied and barter

[1] *Op. cit.*, pp. 20–21.

give way to the use of money. This is described as a perfectly natural process of economic development — a growth keeping pace with the growth of society itself, yet, like Plato, Aristotle cannot escape from the idea that the abuses of money-making and money-lending which he sees everywhere around him are inherent in them. "Like Plato," says Bonar, "he thinks that the natural use of money is very closely connected with the abuse of it in money-making, where the object is not to get goods to use, but to accumulate money for the sake of the accumulation itself, quite apart from the use, the object being the boundless command over the means of satisfying boundless desires. Money-making in fact has excess for its beginning and excess for its end; and this, to a Greek philosopher who describes all virtue as lying in a mean between excess and defect, was a sufficient condemnation. Like later writers, Aristotle allows that profit may be made out of the growing of trees and the rearing of animals, without damage to his neighbours, but shopkeeping and other forms of commerce he seems to regard as forms of cheating; in spite of his own concessions about divisions of labour, the gain of one man always seems to him the loss of another. Most of all he thinks this true of interest, an attempt to breed from barren metal, which is even farther from the proper use of money than is the use made by the ordinary money-maker. After this it is not surprising that he should count the spendthrift a better man than the miser. As miserliness in those days could only mean hoarding, Aristotle's position is excusable."[1]

General Estimate of the Value of Aristotle's Political Philosophy

It has been said of Aristotle by a competent authority, that he was probably the best educated man that has walked upon this earth, and that in his writings became explicit almost everything that was implicit in Greek life

[1] *Loc. cit.*

and civilisation.[1] Of no other part of his works is this latter statement more true than of his *Politics*, which still remains of extreme and manifold value to us of to-day, as indeed it has been to men since the time it was written.

In the first place the scientific method of political inquiry which it exemplifies is, and has been, of abiding value. In the second place, the actual information which it contains and the light which its analyses throw upon the conditions of Greek constitutional life are beyond estimate. "With the most comprehensive knowledge of the facts of history and the completest insight into the actual conditions of social life, Aristotle . . . combines the subtlest power of marshalling in the service of scientific thought the materials which are so supplied."[2]

Thirdly, though dealing with the special conditions of Greek city life, Aristotle's work abounds with general observations which are equally applicable to all forms of political life. Because of the rare sanity and practicability of the advice which he constantly gives, his work has continually served as the *vade mecum* of statesmen. But finally, and above all, the value of Aristotle's political philosophy to all ages lies in the exalted civic ideal which is everywhere implicit in it. This ideal is of a state governed by reason, and having as its aim that perfect justice shall be realised among men. Furthermore, the justice which is thus sought to be realised is not of the formal or purely legal kind, but one which includes the giving to each individual that station of life and assigning to him those duties in and through the performance of which he may develop to the fullest degree the capacities with which he has been endowed by Nature. The state has thus for its end, as Aristotle himself tells us, not simply that men may live, but that they may live virtuously and happily. "It is evident," he declares, "that that govern-

[1] Davidson, *Aristotle and the Ancient Educational Ideals*, pp. 4, 154.

[2] Zeller, *Aristotle and the Earlier Peripatetics*, Vol. II, p. 203, Eng. transl.

ment must be best which is so established that every one therein may have it in his power to act virtuously and to live happily."[1] His ideal state may take many forms, but this is ever its end. A particular polity is maintained, not that its dominion may be extended over as wide a territory or as great a population as possible, not that wealth may be increased beyond all limits, but that knowledge may be widened, that virtue may abound, and that right may be done to every man. In this ideal, Aristotle in truth sums up and exhausts the political heritancy with which Greek thought and Greek political experience has enriched humanity.

Side by side, however, with these manifest excellences, certain defects, or at least limitations, are to be discovered, which appreciably lessen the value of Aristotle's *Politics* to the modern world.

In the first place, Aristotle never gained a true conception of human liberty and equality. The essential nature of all men as moral potentialities he did not recognise, and with this it became impossible for him completely to apprehend that underlying likeness which, concealed beneath individual differences of mind and body, unites all men into one common brotherhood. For the same reason he did not sufficiently appreciate the conditions of freedom under which alone the development of the individual can satisfactorily proceed. As we have elsewhere pointed out, even when criticising the despotism of Plato's *Republic* he lays his emphasis upon the inappropriateness of the means selected by Plato rather than upon the fact that men by their very nature require for their best development a certain freedom from control.

A second cause which renders inappropriate to modern conditions many of the observations of Aristotle is the fact that almost all of his speculations have reference to the small city-state of the Greeks. It thus happens that he has nothing to say regarding many of the political

[1] *Politics*, Bk. VII, ch. II.

problems which are the most important in the states of to-day. Thus we find little or no discussion of questions of local government, of public debts, of standing armies, of methods of taxation. International relations might easily have received attention in his treatise, but, rather strangely, the topic is scarcely mentioned.

Aristotle was of course not unacquainted with large states. Indeed he had himself been in the employment of Philip of Macedon as a tutor for the son who was to become Alexander the Great. But the great Stagirite's eyes were ever turned to the Hellenic cities, and his entire effort was to analyse their public life and to determine, if possible, the means by which they might maintain a healthy political existence. Though he wrote at a time when the era of independent city communities was fast drawing to a close, he nowhere in his writings betrays an appreciation of it. It would not be quite correct to say that Aristotle denied the title "state" to such an empire as that of Philip, but it is true that he could see in such a type none of the excellences which, according to his views, an efficient or ideal state should possess.

Also, as still further limiting the value of the *Politics* to the statesmen of to-day, is the fact that, aside from its lesser size, the Greek state of Aristotle's day was relieved from the solution of many problems which in our day arise out of the manner in which the world is industrially organised. Apart from all those differences which arise from dissimilar modes of production and distribution, the existence of slavery placed all the industrial conditions of Greece upon a basis wholly different from that upon which business of the modern world rests. Thus it is that Aristotle's *Politics* is silent upon many topics with which a modern political work is vitally concerned. From the *Politics* we obtain no light upon all those political problems which arise out of production on the large scale, from the amassing of enormous amounts of capital in the hands of single individuals, from the

establishment of powerful corporations, the formation of great unions of labourers, the creation of vast international commercial interests, the growth of armies of the unemployed.

Finally, it may be added by way of critical conclusion that the order and mode of statement of the *Politics* of Aristotle, though immeasurably better, from the scientific standpoint, than those of Plato, leave much to be desired. Classifications are adopted which are not subsequently adhered to, discussions are promised which are not given, and some important and even essential topics are not mentioned at all; the discussion of others is divided up and distributed among different books instead of being given complete in one place, as one would naturally expect; and, finally, in some few instances, a discussion once begun is abruptly terminated before any logical conclusion is reached. To what extent these imperfections of arrangement and incompleteness of treatment are due to Aristotle having left his treatise in an unfinished condition, or to what extent they have been due to subsequent mutilations of the text by commentators, it is difficult to tell.[1]

Political writing did not cease after the time of Aristotle. Theophrastus, his disciple and successor, taught the art of government to Cassander, king of Macedonia, and to one of the Ptolemies of Egypt. As many as two hundred distinct literary works have been ascribed to his pen, and among them several upon politics.[2] That there were also many other writers upon political matters is well known. It is even reported that this class of writings increased to such an extent that in the time of the Ptolemies, Demetrius of Phalereus persuaded the king to make a collection of them, which later became a basis of

[1] Regarding this lack of systematic arrangement, it should be remarked that none of the ancients had that sense of system which moderns have as an inheritance from the mediæval schoolmen.

[2] Cf. Janet, *Hist. de la Sci. Pol.*, Vol. I, p. 225.

the famous library of Alexandria. None of these works, however, has come down to us, and, so far as we know, none of them had any real merit or originality.

The speculations of Plato and Aristotle thus mark the apogee of Greek political philosophy. From their time the decay of Greece, intellectually as well as politically, was rapid. So intimately had Hellenic thought and life been associated, the decline of the one meant almost necessarily the decadence of the other. With the extinction of the independent city-states, the realisation of the Greek political ideal became impossible. Men's minds and activities were turned in other directions. "The battle of Chæronea, which took place sixteen years before Aristotle's death, by putting an end forever to the free civic life of Greece, removed the very conditions under which the old ideal could realise itself, and forced men to seek a sphere of activity and to form associations outside of the state. The state, indeed, still maintained a semblance of life, and the old education, with its literature, gymnastics, and music, still continued ; but the spirit of both was gone. The state was gradually replaced by the philosophic schools, while intellectual training tended more and more to concentrate itself upon rhetoric, that art which enables the individual to shine before his fellows, and to gain wealth or public preferment. From this time on the spiritual life of Greece found expression in the pretentious, empty individualism of the rhetorician, the lineal descendant of the Sophists, and the philosophical sects, which embodied the spirit of Socrates, their opponent."[1]

The two philosophical schools which later arose — the Stoic and Epicurean — were destined to exercise a wide and long-continued influence, but, as we shall see in our next chapter, they had for their avowed aim not the discovery of the elements of the political good, but the

[1] Davidson, *Aristotle and the Ancient Educational Ideals*, p. 208.

determination of the means by which each man may most surely obtain happiness. By their very premises both dismissed political considerations as irrelevant if not absolutely disturbing factors in the individual's search for his own well-being.

CHAPTER XII

THE STOICS AND EPICUREANS

THE uncertainty of political conditions, the loss of civic independence, the disappearance of the general participation of the people in the administration of government, which followed the overthrow of democracy and the establishment of the Macedonian monarchy, all tended to weaken the political patriotism of the Greeks and to produce a separation between the individual and the state. Largely as a result of this, the centre of speculative interest shifted from the city to the citizen. This individualism was carried to the extent of holding that the individual does not absolutely require the state for the satisfaction of his needs; or, at least, that there is no necessary connection between the individual good and the social good.

Succeeding to the Peripatetics in Greece came the philosophical schools of the Stoics and the Epicureans. Of these two the former had by far the greater permanent influence upon thought, and especially upon political thought.

Of the numerous writings of the Stoics of the three centuries preceding the Christian era, only fragments have been preserved. The general principles taught by them are, however, well enough known. In opposition to both Plato and Aristotle, they found the original source of knowledge in the individual himself. In epistemology they were thorough empiricists, holding that the mind is at birth a complete *tabula rasa*, and receives all its subsequent impressions from perceptions obtained from the outside. In ethics they conceived the source of all good and evil to lie in the capacity or incapacity of the indi-

vidual to adapt his conduct to circumstances and to control his desires and sentiments by the laws of reason. The good man, as well as the happy man, was to them the one who throughout life could yield always to the demands of his rational nature.

The Stoics held the world to be a whole, or a cosmos, with reason as its controlling principle. With them, therefore, the laws of Nature, so far as they were supposed to provide norms of conduct for human beings, were identified with the requirements of right reason. As such, they were considered as the dictates of the individual's will, not as the demands of an objective legislative mind — of Nature as volitional.

In truth, however, the Stoics gave very little attention to the subject of moral sanctions. To them it seemed a self-evident truth that individuals should feel constrained to obey the promptings of their own reason. By obedience to the promptings of one's own reason, the Stoics meant the suppression of passion and the crushing out of the emotions, for these they regarded as disturbing that calmness of mind which they held should be continually preserved by the wise man. Harmony with Nature, which was the key-note of their ethical doctrines, thus meant the absence of every element that might excite or otherwise disturb the individual's serenity. The wise man was he who was able to hold himself superior to disturbance by the ordinary casualties of human life.[1]

Following out this thought, the Stoics taught that though, in a sense, the external conditions of a civilised life are not absolutely essential to man's happiness, yet, in so far as they do in an accidental way minister to his comfort and aid in his development, they are to be accepted and utilised.

[1] Chrysippus is reported to have stated his ideal of life as "a life agreeable to experiences of what happens in the course of nature; for the nature of each of us men is part of the nature of the world." Cf. Pollock, *Essays in Jurisprudence and Ethics*, p. 318.

Contemporaneous with and largely opposed to Stoicism was Epicureanism. Both of these schools made happiness the aim of life. Both thus defined the wise man as one who could secure for himself the best that this life can afford. But they were poles apart in their definitions of happiness, and, therefore, in the advice which they gave for obtaining it. The Epicurean advocated the temperate satisfaction of every desire, sensual as well as intellectual. The Epicurean "prizes the mental joys higher than physical enjoyments, which are connected with passionate agitation. But he seeks the joys of the mind not in pure knowledge, but in the æsthetic refinement of life, in that intercourse with friends which is pervaded by wit and sentiment and touched with delicacy, in the comfortable arrangement of daily living."[1]

The only principle of restraint which the Epicureans taught was that of prudence. Those desires only were not to be yielded to, the gratification of which would ultimately lead to an evil that would more than balance the pleasure received. In accordance with these views, they naturally taught that all the conveniences and benefits of a social and political life are to be unhesitatingly accepted. But no value or merit is ascribed to society or the state beyond this. The right of the state to be is based upon a purely utilitarian basis. Its chief aim is the negative one of protecting individuals against violence and injustice. The wise, seeing the harmfulness of injustice, refrain from it voluntarily. But the mass of men need the fear of punishment before their eyes to deter them from committing wrongs upon one another. Looking at the state in this purely selfish way, the Epicureans recommend to individuals that they derive all the benefit possible from the security thus afforded, and at the same time disturb themselves as little as possible with political affairs. Aloofness from an active political life is advised unless special circumstances require the contrary.

[1] Windelband, *History of Philosophy*, Eng. transl., p. 166.

Much the same attitude is also assumed toward marriage and the family. These institutions are to be utilised when possible, but the individual's happiness is never to be subordinated to their demands.

While the Stoics and Epicureans thus agree in considering a political life as a possible assistance to, but not as an essential element in, the life of a virtuous man, they differ as to the reasons which they assign as leading to the establishment of a state. In the ideas of Epicurus and his followers we find an approximate return to the Sophistic conception of law as a contract. Law, say the Epicureans, is an agreement of utility, entered into between individuals that they may be mutually secured against violence and injustice. Such a thing as a "natural" society is thus expressly denied. All social and political bonds owe their origin to the reflection of men actuated by self-interest.

According to the Stoics, the union of men into societies is based upon feelings of mutual friendliness, and a feeling that, as rational beings, all men are essentially alike and have common desires and destinies. All men are thus viewed as having equal rights and as subject to the same laws of reason.

Upon these premises a doctrine of cosmopolitanism is advanced. The relation of the individual to the whole of humanity is held to be a more important one than his connection with any particular historic state. The union of all men into one brotherhood of reason is fundamental; their association under special political bonds is accidental. The duties flowing from the one are founded in Nature itself; the obligations imposed by civil law have only utility for their basis.

Regarding the cosmopolitan doctrines of the Stoics, it is to be observed, however, that while they thus taught, in a certain sense, the theory of a world-state, it was an ideal universal empire of reason, controlled by the love of humanity, and seeking universal justice, rather than a

political state operating through civil laws, and enforcing its dominion through physical penalties threatened or imposed. "The Stoics thought of this empire only secondarily as a political power; primarily it was a spiritual unity of knowledge and will."[1]

In Stoicism Greek ethical philosophy reached its highest development. In the eyes of Zeno and his followers the independent worth, the moral personality, of the individual man obtained a degree of recognition which up to that time it had received in no philosophical system of the world. In its doctrines was to be found the nearest approach of Hellenic thought to the idea of duty as a distinct moral concept. A life according to Nature and to Reason was preached as an obligation from which the wise man could not escape. The dignity with which the individual became endowed by virtue of his rationality was interpreted as placing a moral responsibility upon him to suppress all irrational and therefore immoral desires.[2] This obligation thus required the conscious subordination of the casual inclinations of the individual to the demands of that authority, Reason, which was conceived as at once the ruler of the moral order of the world and of the individual's conduct. This idea was a distinct departure from previous Hellenic ethical thought. Subordination of self to the social whole had been taught and practised, but not a self-control thus consciously recognised and exercised.

In the system of the Stoics we at last find a well-defined philosophical meaning given to the term *Nature*, according to which it appears as the "manifestation of the single and homogeneous spirit of the world, whose several phenomena are connected together through the common law of right reason. The Law of Nature is, therefore, that common, universal, divine, and good rule

[1] Windelband, *History of Philosophy*, Eng. transl., p. 175.

[2] Even the Stoics, however, did not quite reach a true conception of moral obligation. See *post*, p. 202.

of reason which governs creatures combined in a natural association, regarding it as a reflection of the process of nature, in instinct as well as in the human understanding; it is the harmony of human justice with the law of the world, which results from the identity of moral and of material nature, independently of any positive institution."

By this postulation of human reason as the revealer of the laws of Nature, and as thus the judge of right conduct, the Stoics avoided the absurdities of the Cynic maxims and made their application to ordinary life conformable to the practical and reasonable conditions by which man is surrounded. Thus, "Nature to the Stoics is not the mere chaos of sensible things minus whatever results from man's rational efforts. It is objective reason; it is, as with Aristotle, the divine element in the universe, — the reason of the individual man is only a partial manifestation of it; his reason is a divine element in him, and it is in virtue of this divine element in him that man can understand the reason that is in the universe and can live the life according to nature. Thus, reason is not something that separates the judgment of one man from that of another. The appeal to reason is an appeal to the common reason of mankind. Human laws and institutions, therefore, are no longer despised as merely conventional. They are a realisation, however imperfect, of the Law of Nature which is behind and above them." [1]

It was in the Stoic form that the idea of "Law of Nature" was introduced into Roman law.

With this idea of Reason as the creative source of all order, physical as well as moral, the doctrine of Natural Law received the highest and widest application of which it was inherently susceptible. The designation of the abstractly just, the unwritten, universal, unchangeable norms of conduct, as laws of Nature was, as we have already learned, a general practice in Greek thought. But, until the time of Stoics, the uniform processes of

[1] Ritchie, *Natural Rights*, p. 34.

physical nature were not commonly spoken of as laws. It was Zeno who first applied to them this term. The observed sequences of external nature, because of their apparently inevitable character, were interpreted as due to rules established by that creative reason which is recognised as the ultimate cause of all things. Thus, by the single term *Natural Law* came to be designated both the proper norms for human conduct and the uniform processes of physical nature. These two ideas thus united were destined to remain confused during all the Middle Ages, and, in fact, not to be clearly separated until well into the sixteenth century.

CHAPTER XIII

THE VALUE OF THE GREEK CIVIC IDEAL

We have now reached in our history the point of time at which Greek thought has no longer anything distinctively new to offer us, and when the city-state, the especial product of Hellenic political life, having reached its highest state of development, has begun to decay and (after a brief attempt at federation) is soon to disappear forever in the Macedonian and Roman empires.

Before taking final leave of this peculiar civic type, it will be well worth while to consider briefly by way of summary its special merits, and to explain, if possible, how it was that, organised under it, the Athenians were able to develop that wonderful civilisation which no city since her time has been able to attain ; and also to show how, notwithstanding this success, the city-state had not within itself elements that would enable it to meet new political conditions, or the power to develop a patriotism capable of resisting the attacks of new ethical philosophies.

That the Greek city-state represented an exceedingly high type of political life is beyond doubt. In many respects it secured results for which the nations of to-day strive in vain. During the period of its prosperity it developed among its citizens an intensity of patriotism, and exercised over their lives a control and educational influence to which no modern state can lay claim. To the Greek citizen his city spoke in a multitude of ways, not only through what we now term its political powers, but through its religion, its philosophy, its literature, and its art. Its law appeared to him not as a code of coercive

commands, nor even as establishing a body of rights based upon the abstract notion of legal personality. Its principles were to him the dictates of supreme, unimpassioned, impartial reason. Its control extended beyond the ordering of the technical rights of person and property, and occupied practically the entire field of morality. It told the citizen not only the things that he might or might not do, but what he ought or ought not to do. Its aim was thus not only to regulate his external conduct, but, by the intrinsic justice of its commands, to create in him the disposition to do right. To the Greek, his city was thus at once a state, a church, and a school. The distinction between things "sacred" and things "profane" was unknown to him. What religious feelings he had were indissolubly bound up in his civic love and allegiance. With few books to read, with no schools or universities in the modern sense of the words, and leading an active out-of-doors life, he necessarily gained his education from personal contact and conversation with those wiser than himself, and, above all, from personal experience in the actual administration of the affairs of state. Active participation in public life was to the Greek citizen his natural and necessary vocation. Economic activities being rendered unnecessary by the presence of a large slave population, and also held in contempt, no other occupation was in fact open to him.

That which rendered possible this intensity of civic life was community of race, religion, customs, and interests. Added to this was, of course, the smallness of the political units which rendered it practically possible for every citizen to fill at some time in his life a public administrative position, and to attend regularly at the popular assemblies and law courts.

Surveying such a picture as this, it is easy to see the respects in which the political life of our own day is deficient. There is not that identification of the interests of self with those of the social whole; matters secular and matters

spiritual are unduly divorced ; the rules of private morality are not commonly applied in public life ; patriotism is frequently weak, and, even when active, often little more than a desire for the military glory of the state.

Turning from the facts of political life to the theories by which they are sustained, we find the Greek conception of the nature of the relation of the individual to the state, and of the source of political obligation, to be one that very nearly approaches that held by the most advanced ethical thinkers of the present day. Still it is not precisely the same. One important element is lacking. Hellenic thought, even in its Stoical form, never quite developed a true conception of the nature and dignity of the human individual as a moral person — as a being whose good is an end in itself. Thus the Stoics never declared a correct doctrine of the spiritual equality of all men. This point needs some elaboration.

Spiritual equality refers to men viewed as moral beings, as partakers in the divine reason. In this sense all men are abstractly equal. By abstractly equal we mean that, viewed simply as ethical potentialities, all men are equal before Him who holds them in the hollow of His hand. As actual individuals, however, and as standing before God as their judge, men and women must be considered as entitled to recognition according to their ethical deserts. Spiritual equality thus has reference simply to human beings viewed as beings with moral possibilities. When the question of moral desert is raised, the only obligation that would seem to be imposed is impartiality.

This idea of spiritual equality of all men was practically unknown to antiquity. This appeared explicitly where a caste system upon a religious basis prevailed. Sir Henry Maine tells us that he has himself heard a high-caste Indian declare that it is the teaching of religion that a Brahmin is entitled to twice as much happiness as any one else, and this not upon the ground of individual merit arising from any conduct or mode of life on his part, but

because intrinsically, *quâ* Brahmin, he is twenty times the superior of those of a lower caste.[1]

Aristotle and Plato, while not perhaps explicitly repudiating the idea of spiritual equality, laid no emphasis upon it. In fact, inasmuch as they held that individuals had an existence as persons only as members of the state, their intrinsic worth as persons could have hardly been clearly recognised. Thus, while the physical and mental differences between individuals were clearly recognised and repeatedly drawn, little or no mention was made of the essential spiritual likeness which underlies these differences. The natural result of this was that these mental and physical differences were so emphasised as to divide men into classes almost generically distinct. The gap which thus divided Greek and barbarian was made so broad as wholly to exclude the latter from the essential rights and privileges which were conceived to belong to the former. In this way Aristotle was enabled to defend slavery as an institution just alike to the master and enslaved. It is true that these views may be held to be but emphatic statements of the undoubted natural, physical, and mental inequalities of men. Still, when we find no mention made of the spiritual equality of all mankind ; when man's whole ethical duty in this world is declared to be exhausted in an obligation to further the interests of his state ; when the immortality of the state is dwelt upon rather than that of the individual soul ; and when the individual's claim upon the state for recognition is wholly determined by these natural inequalities of mind and body, — when we consider all this, we cannot avoid maintaining that these philosophers very nearly, if not actually, taught a doctrine of essential inequality.

The Stoics most nearly approached the idea of the spiritual equality of all men, but did not actually reach it. Theirs was a doctrine of equality based on the essential rationality rather than the spirituality of men. To them all men

[1] *Early History of Institutions*, p. 399, Am. ed.

as participants in the world of reason had an essential likeness and equality. They were thus able to reach a doctrine of cosmopolitanism as opposed to the narrow particularism of the Greek city-states. "Cosmopolitanism took the place of politics," says Zeller, "and of this the Stoics were the most zealous and successful prophets. Since it is the similarity of reason in the individuals on which all community among men rests, the two must be coextensive. All men are akin. They have all the same origin and the same mission. All stand under one law, are citizens of one state, members of one body. All men, as men, have a claim to our beneficence. Even slaves can claim their rights at our hands and show themselves worthy of our respect. Even to our enemies, we, as men, owe clemency and ready support."

Stoicism was thus able to reveal to the ancient world a common humanity—a unity of the human race. This, however, was a unity only obtained by rejecting as immaterial and accidental all existing political divisions, and predicating rationality as at once the common and essential characteristic of mankind. It was not a unity based upon a mutual charity, sympathy, and love, following from a conscious recognition that all men and women are moral beings, all the objects of a single divine and loving Will. In fact, such an idea could not develop until a true doctrine of conscience had arisen, and this not even the Stoics had been able to create. "To the Stoic ethics belongs the glory," says Windelband, "that in it the ripest and highest which the ethical life of antiquity produced, and by means of which it transcended itself and pointed to the future, attained its best formulation."[1] This is true, and yet, as we now understand it, the Stoics failed to grasp the idea of moral obligation in its highest sense of requiring the being and doing of good for its own sake. To them, as to other Hellenic schools of thought, the good was ever something ultimately pleasant, a thing

[1] *History of Philosophy*, Eng. transl., p. 176.

to be sought because it was such. They taught, to be sure, that the duty of obedience is not an obligation imposed from without, but a command given from within ; but this command was conceived as based upon utilitarian grounds. Whatever apparent sacrifice was involved in the search for good, they believed was apparent and not real, inasmuch as the realisation of a higher good was supposed more than to compensate for the immediate suffering or deprivation undergone. Thus, in fine, to put the matter in a nutshell, " the central problem of Greek ethics was not to determine the moral laws, but rather to find the chief good and the mode of conduct which would secure it. It was the doctrine of goods, rather than the doctrine of duties, which gave the key-note to the whole moral philosophy of the Greeks. With the Stoics, as with their contemporaries and opponents, the Epicureans, and with Aristotle before them, the aim was to determine the highest good of life." [1]

Thus from the time of the Sophists to that of the Stoics and Epicureans, Greek philosophy was ever carried on with an eminently practical purpose in view. Its final end always was that men should obtain a knowledge that would enable them intelligently to determine and successfully to seek their own greatest happiness. " It costs us something," as Pollock says, " to realise the full importance of philosophy to the Greek or Roman citizens who had received a liberal education. For him it combined in one whole body of doctrine all the authority and influence which nowadays are divided, not without contention, by science, philosophy, and religion in varying shares. It was not an intellectual exercise or special study, but a serious endeavor to gather up the results of all human knowledge in their most general form, and make them available for the practical conduct of life." [2]

A practical conception of man's moral duties, joined

[1] French, *Concept of Law in Ethics.* This discussion of Equality is largely taken from the author's work *Social Justice*, published in 1900.

[2] *Essays in Jurisprudence and Ethics*, p. 314.

with the naïve Greek confidence in the power of the human reason to solve all problems of knowledge, ontological, teleological, and phenomenal, explains this. For it was by philosophy that men were to learn not only the nature of the highest life, but the means by which it was realisable when discovered. To the Greek, therefore, a philosophy was synonymous with a mode of life. The wisest man was the happiest man, for it was not conceived that one could know the good without striving to secure it.

The foregoing explains why it is that in the ethical and metaphysical writings of the Greek we find no discussion of some of the very problems which to modern thought are the most important. Thus, for instance, we find no examination of epistemological questions, no attempted demonstrations of the freedom of the human will, no development of doctrines of conscience, no explanation of the ethical or categorical imperative which furnishes the basis for the moral individualism of to-day.

In order to show more exactly how nearly the Greeks approached, without quite reaching the modern doctrine of the right of the state to be, it will be necessary to state shortly in this place what are the essential tenets of modern transcendental ethics.

As opposed to the utilitarian view, the idealistic or transcendental position is that mere happiness is never the supreme end of conduct. The supreme end is ever the realisation of a self which is conceived as rational and universal, as a partaker in that Divine Reason which is one and indivisible, but which manifests itself in manifold form.

The central concept of modern ethics is thus the moral personality of man. This implies that each individual is able, and in fact is irresistibly impelled, to formulate for himself an ideal of perfection toward the attainment of which he is conscious of a moral obligation to strive. This consciousness of obligation, which takes the form of a categorical imperative posited by his own reason, carries with

it the logical assumptions: first, of a freedom of the will, for without this there would not be even the capacity to obey the obligation which is felt; and secondly, of an inherent right to be allowed to realise in fact, so far as is compatible with their reciprocal rights of others, those conditions of life which are implied in the ideal of personal development which each frames for himself. These principles are summed up by Kant in the two canons: "Be a person and respect others as persons," and "Act externally in such a manner that the free exercise of thy will may be able to coexist with the freedom of others according to a universal law." [1]

From what has been said, it will be seen that modern ethical thought makes the source of moral obligation wholly subjective. It denies the possibility of an objective or external ground of obligation of any sort whatsoever. Whatever obligation the human soul feels comes from the recognition of what is right. When we discover that a thing is right, the sense of obligation to seek it is given to us as an original underived feeling. "Moral obligation is the soul's response to acknowledged rectitude." [2]

Starting from this premise that in the moral field man is self-legislative, but yet determined by the idea of a self-perfection, it is possible to harmonise absolutely the ideas of freedom and control, of liberty and law. In so far as the commands of a social or political power are recognised by the individual as necessary for the realisation of his own best good, which, as we have seen, includes the good of others, such commands no longer appear to him as orders from an external power limiting his freedom, but as imperatives addressed to himself by his own reason. In obeying them, therefore, he obeys, in fact, himself. In theory, then, it is possible to conceive of a society so perfectly organised and administered that at the same time

[1] *Philosophy of Law*, transl. by Hastie, p. 46.

[2] President J. G. Schurman, in the *Philosophical Review*, art. "The Consciousness of Moral Obligations."

that social subordination and obedience are demanded and obtained, the individuals are left absolutely free, inasmuch as they are required to do only such acts as their own reason tells them are just.[1]

This does not mean that the individual should feel himself morally bound to obey only those laws which, taken by themselves, he considers just. But in refusing obedience to a law of the state, or indeed to a social convention of any sort, he must recognise that such law or convention constitutes an integral part of a general system of rights, and therefore that a violation of it will tend, not simply to nullify the command in question, but to weaken the efficiency of the whole system. He must therefore consider, before he resists, whether he may not be able to secure an annulment of the objectionable rule in some better manner, or, if this be not possible, whether it will not be preferable to suffer the evil rather than to bring about the harm which a resistance to it will produce. Furthermore he should remember that (to quote Bosanquet): "It is possible for us to acquiesce, as rational beings, in a law and order which on the whole makes for the possibility of asserting our true or universal selves, at the very moment when this law and order is constraining our particular private wills in a way which we resent or even condemn. Such a law and order, maintained by force, which we

[1] "If we try to form the idea of a divine society or community of men, — and by a divine society, I mean one that is perfect, — we may, without incurring the reproach of manufacturing a utopia, say this much of it. It must have a perfect harmony or unity of all its members and a perfect variety; and the more intense and thorough the harmony is, the more so must the variety be. A perfect society would have an intense oneness, but this oneness would hold amid an infinite variety of character and experience on the part of its individual members. In musical art, when instruments of various kinds sound different notes, we may have a symphony which is one of the most magnificent expressions of superpersonal feeling that humanity knows: such would be the harmony of a perfect society and such is the dream of the world." S. H. Melborne in the *Journal of Ethics*, Vol. VIII, p. 73, art. "Some of the Leading Ideas of Comte's Positivism."

recognize as on the whole the instrument of our greatest self-affirmation, is a system of rights; and our liberty, or to use a good old expression, our liberties, may be identified with such a system considered as the condition and guarantee of our becoming the best that we have in us to be, that is, of becoming ourselves. And because such an order is the embodiment up to a certain point of a self or system of will which we recognize as what ought to be, as against the indolence, ignorance, or rebellion of our casual private selves, we may rightly call it a system of self-government, of free government; a system, that is to say, in which ourselves, in one sense, govern ourselves in another sense."[1]

In result, modern political ethics advocates a subordination of the individual to society as a whole, but does so in such a way as not to abate one whit of his personality or freedom; for this subordination is, in essence, not the subordination of his will to a higher social will, but the identification by the individual of the social will with his own will, so that in obeying the social or political will, the individual obeys his own will purified from selfishness.[2]

When compared with these modern doctrines, the essential defect of the earlier Greek point of view is seen to be that the subordination of the individual to the state, which was submitted to, was an unconscious, unreflective one. The Greek citizen submitted himself to the control of civil law in much the same way that he yielded to the operation of the physical forces by which he was surrounded. As Hegel says, the Greeks had not "that very idea of subjective freedom which constitutes the principle and determines the peculiar form of freedom in our world. . . . Of the Greeks in their first and genuine form of their freedom we may assert that they had no conscience; the habit of living for their country without further an-

[1] *The Philosophical Theory of the State*, p. 127.

[2] The foregoing discussion of transcendental ethics is largely taken from the author's *Social Justice*, pp. 248–251.

alysis or reflection was the principle dominant among them. The consideration of the state in the abstract — which to our understanding is the essential point — was alien to them. Their grand object was their country in its living and real aspect: this actual Athens, this Sparta, these temples, these altars, this form of social life, this union of fellow-citizens, these manners and customs. To the Greek his country was a necessity of life, without which existence was impossible."[1]

From this naïve state of mind the Greeks were awakened by the Sophists, who, however, substituted no new doctrine of political right for that which they destroyed. Nor did Socrates and Plato succeed in reëstablishing that patriotism which they saw so rapidly decaying. The one showed the self-contradictions involved in the Sophistic premises, and the other developed a high political ideal; but neither was able to give to men who took a completely rationalistic view of things, a valid reason why the social welfare should be preferred to the individual good.

Aristotle attempted to furnish a firm foundation for the state by declaring that man is by nature a political being. This declaration which has since seemed so satisfactory to many, is, however, by no means sufficient to support the argument that has been based upon it. In the need for, and the pleasure which people find in, society, we have indeed the cause of the state, that is to say, the natural elements in human nature that urge its establishment and maintenance. But this is not what we are seeking. What we wish to discover is the justification of political authority as humanly exercised, and to harmonise it with a predicated personal freedom.

To speak of the state as "naturally" created makes of it an entity independent of man, uncreated by him, and as such not requiring justification in his eyes. It is thus apparent that Aristotle's view evades rather than answers the problem we are examining. Of course the

[1] *Philosophy of History*, Bohn's ed., p. 262.

state is natural in the same sense that everything that exists is natural. But the fact with which we are concerned is that political power is exercised through devices of human arrangement and construction, and its direction and scope humanly determined. To say that political authority is natural, answers neither the question as to how its actual manifestation is brought about, nor that as to the way in which its control over the individual may be harmonised with the latter's freedom. Furthermore, we can properly conceive of, in fact probably do know of, aggregates of men over whom no such control has been exercised. The state is, therefore, not a universal necessity at any rate, and hence arise the questions: when, under what circumstances, and in what manner shall such control be established? While it is undoubtedly true that the communal life of man necessarily gives rise to mutual interests which require for their realisation the recognition of mutual rights and obligations, this does not of itself create a magistracy nor organise a governmental machinery such as is necessary for the creation of a state. The establishment of these instruments, together with the determination of the content of their powers, requires conscious human action. Aristotle says that "man is by nature a political being," but in the case of individuals who deny that they feel this so-called instinctive sociability or political sentiment, it is no justification in their eyes to say that the general run of mankind is pervaded by this feeling. They would reply that "We do not feel so, and as to us there must be some other justification for the coercion that is exercised over us." And they would further add, "How does such a theory assist in determining the form in which the alleged political instinct shall find expression, and the hands in which this naturally given authority shall be vested?"

The true view which, while recognising the two necessary elements of self and not-self, of liberty and law, yet harmonises them in a higher unity without destroying

them, is first found stated in the philosophy of Hegel. Here the old Greek idea is revived, but corrected by rendering that subordination which to the Greek was an unthinking and almost instinctive submission, a conscious, deliberately chosen subordination. The Greek failed to reach the true view because he recognised but the one element, the will of the state. His thought involved no recognition of the two necessary elements of freedom and authority. In other words, his identification of the individual will with the will of the state was immediate.

In the modern view, on the other hand, the identification is mediate. The two ideas of absolute freedom and absolute subjection are first clearly presented to the mind and then harmonised.[1] Thus, while still retaining the central conception of the "good will," the abstract and impossible Kantian formalism of that will is denied. In its place there is given us the conception of a self that finds its realisation in the outer world, that utilises objective forces and institutions as means for securing that development and perfection which the reason declares. The existence of the state, as thus comprehending the most important of those forces and facts which are necessary for man's highest life, receives the highest possible sanction. Thus, Hegel speaks of the state as the "actualisation of freedom,"[2] and as the "embodiment of concrete freedom."[3]

"In this concrete freedom," says Hegel, "personal individuality and its particular interests, as found in the family and civic community, have their complete development. In this concrete freedom, too, the rights of personal individuality receive adequate recognition. These interests and rights pass partly of their own accord into the interest of the individual. Partly, also, do the individuals recognize by their own knowledge and will the universal

[1] Cf. *e.g.* Caird's "Hegel," in Blackwood's *Philosophical Classics*, ch. II. [2] *Philosophy of Right*, translated by Dyde, sec. 258 add.
[3] *Idem*, sec. 260.

as their own substantive spirit, and work for it as their own end. Hence, neither is the universal completed without the assistance of the particular interest, knowledge, and will; nor, on the other hand, do individuals, as private persons, live merely for their own concern. They regard the general end, and are, in all their activities, conscious of this end. The modern state has enormous strength and depth, in that it allows the principle of subjectivity to complete itself to an independent extreme of personal particularity, and yet at the same time brings it back into the substantive unity, and thus preserves particularity in the principles of the state. . . . In the republics of classical antiquity, universality, it is true, is to be found. But in those ages particularity had not as yet been released from its fetters, and led back to the universality or the universal purpose of the whole. The essence of the modern state binds together the universal and the full freedom of particularity, including the welfare of individuals. It insists that the interest of the family and the civic community shall link themselves to the state, and yet is aware that the universal purpose can make no advance without the private knowledge and will of a particularity, which must adhere to its right. The universal must be actively furthered, but, on the other side, subjectively must be wholly and vitally developed. Only when both elements are present in force is the state to be regarded as articulate and truly organised."[1]

[1] *Idem*, sec. 260 and addition.

PART II

POLITICAL THEORY OF THE ROMANS

CHAPTER XIV

THE POLITICAL PHILOSOPHY OF THE ROMANS

Introductory

As is well known the Romans were not a speculative race. This fact is conspicuously attested by the fact that though we find them developing to an almost final point of perfection a magnificent system of jurisprudence, they yet failed to make any but the slightest of conscious attempts to determine, and arrange in their logical relations, the fundamental concepts upon which their body of law depended. So far, moreover, as metaphysical principles did play an explicit part in their thought, the Romans accepted, without substantial modification, the conclusions reached by the Greeks.

Notwithstanding this metaphysical infertility, however, the Romans made undoubted contributions to the world's knowledge of political theory. Though they made no deliberate attempt to formulate a system of political philosophy, they yet, in the system of law and government which they developed, implicitly recognised and acted upon political principles which marked a distinct advance in theory beyond any point which the Greeks had been able to reach. In addition to this they reduced to more definite and clear-cut form those ideas which they borrowed, and so applied them to the facts of political life as to bring out their significance in a manner which their originators had never been able to do.

Speaking specifically, it may be said that the chief contribution which the Romans made to political philosophy

was in the development of the idea of positive, municipal law. The development of this idea necessarily carried with it the establishment of other conceptions and distinctions which, up to their time, had never been made. Thus it meant the separation of the fields of morality and legality. It meant the formation of an abstract conception of the state, and the distinguishing of it, in idea, from the concept society. It meant the development of the notion of political sovereignty as meaning legislative omnipotence, and, with this, the creation of the idea of legal personality.

In Roman private law we find for the first time the individual instead of the state made the centrum of legal thought. The state, to be sure, appeared to the Roman citizen as the source of all legal rights, but the people, as a political whole, was conceived to be the source whence the state had itself derived its authority. Moreover, however paramount national interests were conceived to be, the main purpose for which the state was held to exist was for the establishment and protection of those rights of the individual which the private law defined. Thus, while in Greece the notions that necessarily underlie a system of private rights were not clearly worked out in juridical thought, — though of course a body of private law existed, — at Rome was created the greatest and most elaborate system of jurisprudence that the world has known.

For the first time in history we find in the political philosophy of the Romans the state conceived as a legal organisation, as a political entity operating through organs which have been established and endowed with authority by definite laws. For the first time we find the citizen viewed as having definite rights and possessing a sphere of freedom which is not to be trespassed upon either by other citizens or by the state itself. As the great Romanist Ihering has said, the private law of Rome was the Magna Charta of its citizens.

Stating this idea in another way, we may say that in Roman thought the individual and the state were separated. Each appeared to be an independent entity, but as having reciprocal rights and duties. The state did not swallow up the individual, as in the Platonic republic, nor did it disappear as an essential institution as in the thought of the Cynics, Sophists, and Epicureans. The principle that the *salus publica* is the *suprema lex* was accepted, yet the actual interference by the state in the private affairs of the citizen was so limited as to leave to him a considerable reach of freedom. In Rome "the state begins to have an abstract existence, and to develop itself for a definite object, in accomplishing which its members have, indeed, a share, but not a complete and concrete one (calling their whole being into play). Free individuals are sacrificed to the severe demands of the national objects, to which they must surrender themselves in this service of abstract generalisation. The Roman state is not a repetition of such a state of individuals as the Athenian Polis was. The geniality and joy of soul that existed there have given place to harsh and rigorous toil. The interest of history is detached from individuals, but these gain for themselves abstract formal universality. The Universal subjugates the individuals; they have to merge their own interests in it, but in return the abstraction, which they themselves embody, — that is to say, their personality, — is recognised; in their individual capacity they become persons with definite rights as such." [1]

The development of the ideas of which we have been speaking were, as we have already intimated, closely related with the growth of the idea of positive law. Our next task will therefore be to trace this growth. In doing this it will be found that, as in the case of Greek legal thought, and indeed, as in the case of the development of all early systems of law, the progress of thought is ex-

[1] Hegel, *The Philosophy of History*, Eng. transl., p. 113.

hibited in the gradual secularisation of the law. The religious element is at first all important; by degrees the influence of custom and traditional usage becomes more direct; finally, in the will of the human legislator is seen the immediate source of the law's authority.

CHAPTER XV

THE DEVELOPMENT OF THE IDEA OF POSITIVE LAW

Despite the light that has been gained from the researches of the last fifty years, extremely little is certainly known of the earlier periods of the history of Rome. Of the time when the Roman state was forming and kingly rule being founded we know almost nothing. Even of the period after the establishment of the monarchy and up to the time of the revolution which introduced republican government we are seldom able to speak with definiteness. After all the fables are rejected "we have little more left than the simple statement of Tacitus 'in the beginning kings ruled over Rome.'"[1]

Of the fact of the original kingship we are reasonably certain. And, moreover, from many known elements in the laws and institutions of the republican period which must have been survivals from the royal period, we can gain, if not a definite, at least a general, idea of what must have been the conception of the state and of law held during those earlier years.

In the first place the great influence of the religious element in law and politics is clearly made known. The Roman state is disclosed to us as a union of a number of tribes or smaller social groups united and organised upon an essentially religious basis. Community of religious worship is the one real bond of union. The smaller political groups are related to one another and combined into a single political whole through the performance of common religious rites. The unit of association is the

[1] Taylor, *Constitutional and Political History of Rome*, p. 3.

family, and the family life is centred around its altars. Its absolute head, the father, is above all its high priest. So also in the Gens, common participation in certain religious observances furnishes the integrating element. Finally, in the Roman state itself, the same principle is applied. The king, or *rex*, presides as high priest as well as supreme judge and leader in times of war.

In these times no developed system of laws of course existed. The early Romans governed their state and administered private justice according to a mixture of religious regulations, rules sanctioned by custom, and popular conceptions of what was right. All, however, were conceived as ultimately resting upon a religious basis.[1]

Offences against public order were regarded as injuries to the gods rather than as crimes against the state, and were punished accordingly. The offending one was placed beyond the protection of the gods and rendered in effect an outlaw, — a *homo sacer*, — against whom any man's hand might be raised with impunity.[2]

[1] Speaking of these laws, Clark says (*Early Roman Law*, pp. 12–14): "They are mere statements of the religious feeling and sentiment current upon the matters to which they refer, and have scarcely a more authoritative aspect than those curious prohibitions which occur in the latter part of Hesiod's *Work and Days*. Express sanction there is none; a practical one probably operated partly in fear of divine displeasure, partly in reluctance to incur the disapproval and lose the religious fellowship of the society in which one lives." It seems not unlikely, however, Clark continues, "that some of the prohibitions originally dictated by a purely religious feeling came, in later times, to do duty, by formal enactment, some as sumptuary, some as sanitary laws, some as minor regulations for public order and decency. This certainly appears to be the case with much of the burial law of the Twelve Tribes, which may be noticed here as having very little bearing on the ordinary province of law."

[2] "The *homo sacer* was in every sense of the word an outcast — one with whom it was a pollution to associate, who dared take no part in any of the institutions of the state, civil or religious, whose life the gods would not accept as a sacrifice, but whom, nevertheless, any one might put to death with impunity as no longer god-protected." Muirhead, *Introd. to the Private Law of Rome*, p. 18.

In the one mode of judicial procedure that is known to have existed, the religious character of this period is also shown. This legal action, "the undoubted parent of all the Roman actions, and, consequently, of most of the civil remedies now in use in the world,"[1] was known as the *actio sacramenti*.[2] This name was derived from the fact that it was required that a certain sum of money, or *sacramentum*, should be deposited by each contestant in the dispute, as a guarantee of the truth and justice of his cause, which sum was forfeited by the loser and devoted to the public worship.

Of a formal system of judicial procedure beyond this there was little trace. For the adjustment of all minor differences arising between members of the same family or gens, the authority of the father or chief was held sufficient. In other cases recourse was probably had to self-redress or vengeance on the part of either the injured party or his friends. Only in some of the more serious crimes, such as treason, sedition, or murder, or where vengeance was carried beyond its legitimate bounds, is it likely that the public authority felt called upon to intervene.

Though, as has just been said, the real sanction to early Roman law was a religious one, we find that a distinction was made between those rules which were conceived as the direct commands of the gods, and those laws, the substantive principles of which were held to have become explicit in the customs of men. This distinction was made plain by the use of the two words *fas* and *jus*.

Fas the early Romans used as meaning rightness in the purely religious sense. A rule was *fas* which was conceived as directly due to a command given by the gods to men for the guidance of their conduct. In general the rules so designated related to matters of religious ceremonial. Many of them, however, were of a more secular

[1] Maine, *Early History of Institutions*, Am. ed., p. 252.

[2] Gaius gives a detailed account of this *actio* in his *Institutes*, IV, 10–17.

character. Thus it was *nefas* to break faith, to refuse hospitality to foreigners, to strike one's father or mother, to move a boundary stone, or to commit incest. Any one committing any of these offences could be declared a *sacer homo*. It is quite apparent, therefore, that despite their purely religious source, these laws did not lack an effective secular sanction. The term *fas* thus had at Rome a meaning very similar to that given to the word *Themis* in Greece. *Fas* was, however, the more abstract term and was never personified.

The original meaning of the word *jus* is in doubt, for its etymology is not certainly known. "Recent philology," says Muirhead, "derives the word *jus* from the Sanscrit *ju*, to 'join, bind, or unite,' from which some deduce as the signification of *jus*, 'that which binds'; 'the bond of society'; others that which is 'regular, orderly, or fitting.' The latest inquirer (M. Bréal) identifies it with the *jos*, *jaos*, or *jaus* of the Vedas, and the *jaes* of the Zend-Avesta, — words whose exact meaning is controverted, but which he interprets as 'the divine will.' *Jubeo* is generally allowed to be a contraction of *jus hibeo*, 'hold or take,' as *jus*." "If Bréal's definition can be adopted," Muirhead continues, "we obtain a very significant interpretation of the words addressed by the presiding magistrate to the assembled comitia in asking them whether they assented to a law proposed by him — *Velitis*, *jubeatis*, *Quirites*, etc. — 'Is it your pleasure, Quirites, and do you hold it as the divine will, that,' and so on. As legislation by the comitia of the curies and centuries was regarded as a divine office and their vote might be nullified by the fathers on the ground that there had been a defect in the *auspicia*, and the will of the gods consequently not clearly ascertained, this explanation of Bréal's seems not without support — *vox populi*, *vox dei*. If it be right, then, the only difference between *fas* and *jus* was that the will of the gods, which both embodied, was in the one declared by inspired, and in the other by merely human, agency." [1]

[1] *Private Law of Rome*, p. 18.

One thing is certain, *jus* was the term which the early Romans used when they spoke comprehensively of their law. In later times, when the idea of statute law became more important, they gave to it a narrower sense, contrasting *jura* with special written enactments. But in general *jus* is opposed to *fas*, and indicates law directly established by men and not by the gods. It means, moreover, permanent human law — rules become fixed by the custom of men, and as such accepted and enforced by the state. It has thus a somewhat narrower meaning than the Greek δίκαιον, which connoted moral as well as legal justice.

Besides *fas* and *jus*, or *jus moribus constitutum*, the early Romans also employed the term *boni mores*, by which they indicated those rules of conduct which they recognised as just and proper, but which were supported by the imperative sanctions of neither religion nor custom. In the main, therefore, these depended for their observance upon the good conscience of the individual, the authority of the family tribunal, or, later, the censor's *regimen morum*.[1]

[1] In describing this element in the public and private order Muirhead says: "Its function was twofold: sometimes it operated in restraint of law by condemning — though it could not prevent — the ruthless and unnecessary exercise of legal right, as, for example, that of the head of a house over his dependents, and sometimes it operated supplementarily, by requiring observance of duties that could not be enforced by any compulsion of law. Dutiful service, respect, and obedience (*obsequium et reverentia*) from inferiors to superiors, chastity (*pudicitia*) and fidelity to engagements express or implied (*fides*) were among the *officia* that were thus inculcated, and whose neglect or contravention not only affected the reputation, but often entailed punishments and disabilities, social, political or religious. To increase the respect for such virtues, and make their observance in a manner a religious duty, some of them were deified and provided with a temple and a cult. *Fides* was one of them. There were none of the minor *numina* for which the ancient Roman had greater reverence. Whether in public or private life, an engagement in his eyes was sacred. An avoidable breach of it is said to have been extremely rare. If he failed, the *jus* had no punishment for him. It might reach a man if he had engaged *per aes et libram* or by a formal *sponsio;* but then the ground of action was the *nexum* or *sponsio* in which his engagement was clothed, not the engagement itself. 'He agreed, but has not stood to his agreement,' was a plaint of which the ordinary civil tribunal took

As has already been said, of statutory law during the regal period there was very little. The so-called *leges regiae*, despite their name, cannot be considered as having owed their existence originally to the express will of the kings.[1] They were simply laws to which a high degree of authority was ascribed, and which owed their name to the fact that the enforcement of the rules which they state was placed under the direct supervision of the kings. In this respect they were, as Sohm observes, of precisely the same character as the early Attic religious ceremonial regulations, which also were called "royal laws" because the administration of them was made an official duty of the Archon Basileus.[2]

The Roman *leges regiae* were, in fact, almost wholly concerned with matters of religion and morals, and not with rules for the government of civil conduct.[3]

no cognisance. Whether the pontiffs ever did so, viewing it as a dishonour of *Fides*, does not appear ; but as a contravention of *boni mores*, it was undoubtedly a matter for the animadversion of those who exercised the *regimen morum*, — the king over the citizens generally, the *gentes* over their members, and probably the *collegia opificum* over the *sodales*." *Private Law of Rome*, p. 22.

Moyle calls attention to the fact that *mos* is to be distinguished from *consuetudo* in that it includes "positive morality" no less than rules strictly legal. *Imperatoris Justiniani Institutionum*, Vol. I, p. 98.

[1] These laws were collected into the *jus civile Papirianum*.

[2] *Institutes of Roman Law*, Eng. transl., 1892, p. 28, note 2.

[3] The chief authority upon these laws is Voigt, *Ueber die Leges Regiae*, Leipsic, 1876. Muirhead says, regarding them : "Pomponius speaks of certain laws enacted by the comitia of the curies, which he calls *leges regiae*. The opinion of the best authorities is that it is a mistake to attribute those so-called 'royal laws' to that assembly. According to the testimony of the old writers it had very little share in the work of legislation. Romulus *jura dedit* at his own hand — not *jura tulit*. . . . Mommsen is probably near the mark when he describes the *leges regiæ* as mostly the rules of the *fas* which were of interest not merely for the pontiffs but for the public, with which it was of importance that the latter should be acquainted, that they might know the risk they incurred from their contravention. . . . It is not to be assumed that there was no legislation beyond this ; some of the laws of which we have record were of a different character. But on the whole it seems beyond doubt that it was cus-

The term which the Romans employed specifically to designate positive or statutory law was *lex*, or *lex publica*. As in the case of *jus*, the etymology is somewhat in doubt, but the most likely derivation seems to be from *legere* (to read out as from a written instrument) and not from *ligare* (to bind), from which it is often traced. The jurists used the word generally as meaning any obligation or express statement embodied in a private deed (*e.g. lex mancipii, lex testamenti*); but when used in its political sense (*lex publica*), it always indicated a legislative enactment of a comitia; that is, an express utterance, stating a general rule of conduct, or defining a general right, issued by a popular assembly and binding as such upon the whole *populus Romanus*.[1]

Lex, it is to be observed, thus always indicates, at the hands of the classical jurists at any rate, a particular statute, not the whole body of law. To express this idea they used the word *jus*. For example, the Roman always said *jus civile* or *jus gentium*, never *lex civilis* or *lex gentium*.

As a definite system of jurisprudence, the history of the Roman law begins with its codification in the Twelve Tables. Sir Henry Maine contrasts as follows the character of this decemviral code with the so-called codes of the East: "From whatever cause," he says, "the codes obtained by Eastern societies were obtained, relatively, much later than by Western, and were of a different character. The religious oligarchies of Asia, either for their

tom rather than statute that was the main factor of the *jus* of the regal period." *Private Law of Rome*, p. 20. Cf. Moyle, *Imperatoris Justiniani Institutionum*, Vol. I, p. 2.

[1] "*Lex* means literally that which is 'laid' or 'fixed,' in other words, a statute. In the language of the Romans, *lex* means anything which is 'laid down' or 'settled,' and which being proposed in a certain form by one party, is accepted by the other (*e.g.* the *lex commissoria*). A *lex publica*, then, is a covenant or statute proposed by the magistrate and accepted by the people which binds the community in virtue of this reciprocal declaration." Sohm, *Institutes of Roman Law*, p. 28, n. 1. The significance of the reciprocal action between the proposing magistrates and the accepting assembly will be mentioned in the next chapter.

own guidance, or for the relief of their memory, or for the instruction of their disciples, seem in all cases to have ultimately embodied their legal meaning in a code; but the opportunity of increasing and consolidating their influence was probably too tempting to be resisted. Their complete monopoly of legal knowledge appears to have enabled them to put off on the world collections not so much of the rules actually observed, as of the rules which the priestly order considered proper to be observed. The Hindoo code, called the Laws of Manu, which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observances of the Hindoo race, but the opinion of the best contemporary orientalists is, that it does not, as a whole, represent a set of rules actually administered in Hindustan. It is, in great part, an ideal picture of that which in view of the Brahmins ought to be law. . . . The Roman code [however] was merely an enunciation in words of the existing customs of the Roman people."[1]

Though thus not creative of practically new law, the preparation of the decemviral code was not only of great importance in the political history of Rome, but, from the form and the manner in which it was adopted, of great significance as marking the beginning of a new period in the history of her legal development. The laws thus promulgated were the first fairly to deserve the name of *leges*. Their enactment indicated the disappearance of custom as the chief original source of law, and the establishment of the idea that offences against the law are primarily punishable as crimes against the state, and not as violations of the commands of the gods. From this time on the Roman understood by law the will of the state ; and custom as far as it had not been transmitted into *lex* by the Twelve Tables, was thereafter looked upon as having but a qualified legal force. In general its rules were to be followed by the *judices* where no *lex* ordered otherwise. But even where no law stood opposed a certain discretion was per-

[1] *Ancient Law*, Am. ed., ch. I, p. 16.

mitted as to whether a given usage should or should not be given the effect of a legal principle.[1]

The legislative codification of the law in the Twelve Tables necessarily established also, once for all, the principle that municipal law was primarily of human origin. The Tables themselves declared that "What the votes of the people have ordained in the last instance is the law."[2]

This secularised conception of the decemviral laws appeared plainly in the change in character of the penalties which were prescribed. Instead of such religious punishments as excommunication (*sacratio capitis*, *sacer esto*, etc.), as found in the *Leges Regiæ*, throwing from the Tarpeian rock, hanging, burning, flogging, and beheading were provided. In fact, a purely religious sanction appears but once in the entire code.

However, the religious element, though thus pushed into the background, by no means disappeared. Many of those public offences, which were declared public or civic crimes, were also described as injuries to particular deities, and in some cases the property of the offender was forfeited directly to them. Furthermore, and what is still more important, the idea still remained, and was to remain for many years, that the state's, or rather the people's, legisla-

[1] Ulpian says, "Diuturna consuetudo pro jure et lege in his quae non ex scripto descendunt observari solet." (*Digest*, 1, 3, 33.) Also in the Code (1, 14, 2) we read that no customs are to be received as valid that are opposed to law or reason. In the *Institutes*, however, one finds the statement that "the unwritten law is that which usage has approved; for daily customs, established by the consent of those who used them, put on the character of law." (I, 2, 9.)

These quotations indicate that up to the time of the final codification of the Roman law by Justinian, custom continues to serve as a source of law. This is true, but does not invalidate the statement that, approximately from the time of the decemviral legislation, law in its highest and truest form became statutory, and, other things being equal, *lex* was to be followed rather than customary *jus*, where the two conflicted.

[2] Livy, VII, 17, "in duodecim tabulis legem esse, ut quodcumque postremum populus jussisset, id jus ratumque esset."

tive power was to be exercised in strict conformity with religious ceremonial requirements, and that thus, in fact, a final religious approval was needed for every measure that was proposed or voted upon. To the votes of the people, even when that vote was unanimous, it was required that the Augurs should attest the approval of the gods.[1]

With the establishment of the republic the Patricians became the depositaries of the knowledge of the religious laws, and it was upon the basis of this necessarily exclusive possession that the struggles of the Plebs for a participation in the legislative power was resisted. In later times, when the religious sentiment so greatly declined, this of course became a mere excuse. But in those earlier years the argument was seriously and honestly made.

The actual political power thus given to the Patricians was a very considerable one, for the alliance between religious and legal form was carried into almost all the departments of the public administration. "The Pontiffs were, above all others, regarded as the public priests of the Roman people; they were interpretators of signs and portents; they decided when and with what sacrifices, expiation should be offered by the state, when the favour of the gods seemed to be alienated; they protected the state from contamination by the admission of foreign rights of which they did not approve, they were the repositories to a great extent of formal law and procedure . . . ; and above all they arranged the Roman calendar; they decided which days should be *fasti* and which *nefasti*, that is, which days should be available for the business of the law courts and assemblies, and which should be kept for holidays and sacred rites. It is clear that this gave opportunities for political manœuvring; *e.g.*, an unwelcome measure which was to come before the Comitia on a certain date might be postponed to a more favourable occasion by declaring the day *nefastus*. . . . The Augurs were the

[1] See *e.g.* Dionysius, IX, 41, 49; X, 4; and Livy, III, 31.

depositaries of the *Divinatio*, *i.e.*, the interpretation of the *auspicia* (*auguries*). They performed the *inauguratio* of all places where the auspices were to be taken, or where an assembly was to be held for which the auspices were necessary; there they marked out the region of the heavens (*Templum*), which was to be watched for the appearance of any sign of the gods. It was in the performance of this duty that their political influence consisted; by announcing the appearance of any unfavourable sign the Augur could stop the procedure of an assembly, or nullify any business that had been transacted there by afterwards finding a flaw in the auspices."[1]

Even after many of the magistracies had been opened to the Plebs, and when, by the Valerian-Horatian laws (449 B.C.) and those of Publilius Philo (339 B.C.), the legislative power of the Plebeian assemblies had been firmly established, the exclusion of the members of the lower order from the pontificate operated as a serious limitation upon their power. For this still left the Patricians in the exclusive possession of the knowledge and control of the legal formalities. In 304 B.C., however, this legal monopoly was seriously weakened by the publication by the Ædile Flavius, of the calendar and an account of the *legis actiones* or formulæ applicable to the various kinds of actions at law. With the publication of this knowledge, the divorce of law and religion in the administration of justice in the Roman state began, and an opportunity was given for the rise of a class of purely secular lawyers.[2]

[1] Taylor, *Political and Constitutional History of Rome*, p. 139.

[2] The publication of the calendar by Flavius did not entirely deprive the pontiffs of their power to influence legislation, for this calendar made public only the "fixed" festivals, leaving the knowledge and control of the movable feasts still within pontifical control. Thus it was possible for a patrician magistrate, after consultation with the pontiffs, to postpone comitial action by assigning some extraordinary festival and movable feast to the day upon which the assembly was to meet. By the law of 300 B.C. the Plebs gained the right of electing members of

In concluding this account of the part played by religion in the development of the law and in the administration of the Roman state, it is to be observed that, whatever special privileges the Patricians may have at any time possessed, they never constituted, properly speaking, a priestly order. That is to say, they never stood apart from the general citizen body as a class primarily religious and with rights that derogated from those of the state. Whatever rights they had, they possessed under the law. Their peculiar religious functions were, in fact, considered essentially political as well. The *jus sacrum* was an integral part of the Roman *jus publicum*, not a system of laws independent of, or superior to, it. Thus, all the chief public officials had, *ex officio*, religious functions to perform.[1]

their own order to the three priestly colleges. This left but a few religious positions, which were of comparatively little political importance, in the exclusive possession of the Patricians.

[1] Professor George E. Howard has suggested to the author the following comment upon the influence of religion in Roman polity. In the sense that religious conceptions or prejudices were not dominated to such an extent by political expediency, the Greeks were more religious than the Romans. It was largely due to the tenacious bonds of blood and religion that the Greeks did not advance beyond the city-state. In Rome the centre of the religious idea was obligation, an implied contract with the gods. The centre of the religious system was the college of Augurs. The Augur was practically the agent of the magistrate. To the magistrate and not to the Augur the auspices were sent. Hence politics dominated religion. The auspices, it may be remarked, were always on the side of the political majority. To this fundamental fact must be largely ascribed the development of the idea of expansion by federation and incorporation, and of the splendid system of law. Religion, so to speak, did not hinder the development of statesmanship.

CHAPTER XVI

THE ROMAN THEORY AS TO THE LOCATION OF SOVEREIGNTY IN THE STATE

PROBABLY the best-known sentence in the Roman civil law is that which reads, "Quod principi placuit, legis habet vigorem." This dictum, inserted in the very front of the *Institutes*, did great service in mediæval and early modern times in validating claims to absolute legal supremacy. And yet the words which immediately follow, and which are interpretative of the statement preceding, are, "Cum lege regia quæ de ejus imperio lata est, populus ei, et in eum, omne imperium suum et potestatem concedat." The ordinance of the prince has the force of a law, for the people by the *lex regia* have made a concession to him of their whole power.[1]

[1] *Institutes*, I, 2, 6. This concession of power to the prince was interpreted as working an absolute alienation and not a mere delegation of the sovereign power of the people. The words of Gaius (I, 1, 5) are to practically the same effect as those of Justinian's *Institutes*, "Constitutio principis est, quod imperator constituit, nec umquam dubitatum est, quin id legis vicem obtineat cum ipse imperator per legem imperium accipiat." A constitution of the prince is that which the emperor has established, and it has never been doubted that this has the force of law, since the emperor himself receives his authority by law. And a law Gaius expressly defines as a product of a vote of the people, "Lex est quod populus jubet atque constituit" (I, 1, 3). Ulpian says (*Digest*, 1, 4, 1, pr.), "Quod principi placuit legis habet vigorem, utpote cum lege regia quæ de imperio ejus lata est populus ei et in eum omne suum imperium et potestatem conferat." See also the statement of Pomponius, quoted in the *Digest* (1, 2, 2, 11), where he says that after the growth of the empire it became impossible for the Senate to govern all the provinces well, and therefore a prince was created and the right given him that what he should establish should be accepted.

Thus, it would appear that, according to Roman theory, the real legislative power was, originally at least, in the people.

Again, in the second section preceding that from which the foregoing quotation is taken, occurs the following definition of a law (*lex*): "Lex est, quod populus Romanus, senatorio magistratu interrogante (veluti consule) constituebat," — "a law is what the Roman people enact at the request of a senatorial magistrate." [1]

Corresponding to these later declarations of the Roman theory we find, in fact, that from the earliest times of which we have authentic record, until the close of the imperial period, the Romans accepted, in theory at least, the central idea of popular sovereignty that the source of all political authority, the *fons et origo* of the legislative power of the state, is in the people.

Beginning with the regal period, we find unknown the theory that any one individual being is ever absolutely entitled to rule, either by reason of his supposed divine antecedents or his membership in a particular family.

"The Romans," says Mommsen, speaking of this time, "knew nothing of a special divine grace granted to a particular family, or of any sort of mystical charm by which a king should be made of different stuff than other men: noble descent and relationship with earlier rulers were recommendations, but were not necessary conditions; the office might be lawfully filled by any Roman come to powers of discretion and sound in body and mind. The king was simply an ordinary burgess. . . . The burgess submitted to his rule without precisely accounting him better." [2]

The Roman burgesses were thus a community of individuals who stood upon an original footing of political equality. Owing no obedience, natural or divine, to any one, they freely chose their own ruler. When elected,

[1] *Institutes*, I, 2, 4.

[2] *History of Rome*, Eng. transl., Vol. I, p. 84.

however, this ruler held office for life, could not be constitutionally deposed, and was as fully entitled to the allegiance of all citizens as though he ruled by divine right or hereditary descent. He possessed the absolute power of the state, he was the high priest, and held the *imperium* both for war and peace.

In its absolute character, the king's power closely resembled that of the father over the members of his family, with, however, this distinction. At the king's death his *imperium* disappeared. That is to say, it returned to the burgesses or their representatives, the Patres, who had originally given it to him. The *patria potestas*, on the other hand, descended to the legal heir.

In connection with this fact of the elective character of the early kings one other peculiarity of early Roman practice deserves mention and explanation. It seems to have been an established maxim that, as a matter of form, magisterial power should always be handed on to a new official by one already holding it. Thus when a king died the Patres would first nominate a so-called *Interrex*, who, after five days, would nominate a new *Interrex*, and he in turn would name the next king. Even then, however, the burgesses owed no allegiance to the one so nominated, until, by a law passed in their own assembly (*lex curiata*), they had expressly conferred the *imperium* upon him, and this action had been confirmed by the formal sanction (*auctoritas*) of the Patres.

This idea of the political equality of all citizens, and that in them, as a body, rested the ultimate sovereignty of the state was never lost sight of during the entire history of Rome. During the regal period the king was ever viewed as the representative and delegate of the people, and, though given supreme administrative power, never had the right to change, without the consent of the burgesses, any of what might be called the constitutional institutions of the state. During the republican period the sovereignty of the people became, of course, still more

explicit, and as we have seen from the quotations from the *Institutes* of Justinian, was still accepted, in theory at least, during the imperial period.

This idea of popular sovereignty was accepted not only as explaining the source of magisterial power, but as indicating the original fount of legislative power. All law was conceived to be an expression of the will of the people. This is explicitly stated, as we have already learned, even in the time of Justinian, when the *lex regia* is referred to as the source of the Emperor's legislative power. Throughout the history of the development of Roman law, the theory appears also in the distinction almost uniformly made between *leges* and *plebiscita*.[1]

A *plebiscitum* expressed the vote of the Plebs only. A *lex* was the product of a vote of the whole *populus*. "A law," says the *Institutes*, "is what the Roman people enact at the request of a senatorial magistrate; — a plebiscite is what the commonalty enact when requested by a plebeian magistrate. . . . The word commonalty (*plebs*) differs from people (*populus*) as a species from a genus; for all the citizens, including patricians and senators, are comprehended under the term people. The term commonalty includes all the citizens except patricians and senators." Because, therefore, the plebiscites did not express the votes of the whole people, they were not originally binding upon the entire *populus*. In strict conformity with the principle of the "consent of the governed" such resolutions were held binding only upon those who had assented to them.

Not only this, but in their very form of enactment, and in the formulæ employed, the legislative sovereignty of the people was made manifest. The *leges* took the form of contracts or agreements. They were enacted by the

[1] This distinction of course disappears after the Hortensian law. See *post*, p. 236. In later times the term *leges* was sometimes improperly applied to resolutions of the plebs only; and thus, for the sake of distinction, we find used the phrases *leges curiatæ* and *leges centuriatæ*.

coöperation of the magistrates with the comitia. A law was proposed in the form of a question (*rogatio*) addressed by king, interrex, or consul to the people assembled in their comitia, for their affirmation or negation by a majority vote. "Among the Romans, therefore," as Mommsen says, "law was not primarily, as we conceive it, a command addressed by the sovereign to the whole members of the community, but primarily a contract concluded between the constitutive powers of the state by address and counter-address. Such a legislative contract was *de jure* requisite in all cases which involved a deviation from the ordinary consistency of the legal system." [1]

The exact manner in which the Plebs gained for their *plebiscita* the full force of *leges* is one regarding which those learned in Roman constitutional law have not always agreed. Regarding the general character of the steps by which the change was brought about, however, there is sufficient agreement. Originally, it is certain, the resolutions of the Plebs in their Concilia were not binding upon the whole state.[2] They were nothing more than, as Taylor says, "merely strong expressions of the opinion of a numerically important section of the community which the patrician government might legally ignore, but which they often found it expedient to pay attention to." [3]

In case the Plebeian proposal met with the approbation of the Patricians, or if for political reasons they saw fit to accept the measure thus offered, the matter was brought by the Consul before the Senate; and if there approved,

[1] *History of Rome*, Eng. transl., Vol. I, p. 94. In a note Mommsen adds: "*Lex* (obscure in origin but related to *legare*, to depute, to appoint) denotes as is well known, a contract in general, along, however, with the connotation of a contract whose terms the proposer dictates and the other party simply accepts or declines. . . . In the *lex publica populi Romani*, the proposer was the king, the acceptor the people; the limited coöperation of the latter was thus significantly indicated in the very language." We have not accepted Mommsen's derivation of the word *lex* (see *ante*, p. 225); but this is comparatively unimportant.

[2] Gaius is perfectly definite upon this point (I, 1, 3).

[3] *Op. cit.*, p. 87.

the Consul was directed to draft the law and present it to the Comitia Centuriata. This he might refuse to do; but if he did not refuse, and the law was favourably acted upon by the centuries, it was then ready for the final sanction of the Patres or Patrician section of the Senate (*patrum auctoritas*), by which it became *lex*, having thus been officially accepted by all the orders of the state.

The opportunities offered in this rather complicated mode of legislation for defeating the will of the Plebs are sufficiently plain. For many years, therefore, the efforts of the lower order were directed toward removing these checks by rendering mandatory upon the magistrates and the Patrician bodies the steps which, according to the above procedure, were discretionary only. In 449 B.C. by the Valerio-Horatian laws the Consuls were compelled to bring all *plebiscita* before the Senate. By the law of Publilius Philo, 339 B.C., it was required that the *patrum auctoritas* should be given before and not after the comitial action. This was an important point to the Plebs as it prevented the Patricians from alleging some technical defect to defeat the law after it had received the sanction of the centurial assembly. Finally by the Hortensian law of 287 B.C. not only was the need of bringing a Plebeian vote before the Senate abolished, but the necessity of bringing *plebiscita* before the Comitia Centuriata itself was removed. Thus the resolutions of the Plebis Concilium were given the immediate effect of legislation.[1]

This last concession would seem to have established a principle contradictory to the general legal theories of the Romans. Apparently it gave to the votes of a Concilium the force that could only be given to the resolutions of a Comitia. It apparently made the enactments of a part of

[1] The elder Pliny says that the Hortensian law provided *ut plebiscita universum populum tenerent.*

Livy, VIII, 12, speaks of the Publilian law as providing *ut plebiscita omnes Quirites tenerent,* but the better opinion seems to be that he was mistaken in this. The Roman lawyers referred to the Hortensian law as first bringing this about.

the *populus* — the Plebs — binding upon the whole. The explanation why this was done, or, when done, how it was squared with the fundamental Roman theory that only that law can be binding upon the whole people which has been assented to by the whole people, is not perfectly plain. Austin is disposed to accept the suggestion of Hugo (which is certainly a rational one) that from or before the time that full legal effect was given to Plebeian votes it was the custom for the Senate to prepare the measure which was to be presented to the Plebis Concilium. If this were so, then the entire people really had a voice in legislation. The Senate, which of course included the heads of the Patrician families, had the initiative, and the Plebs had the power of adopting or rejecting measures so proposed.[1]

The establishment of the Empire upon the ruins of the republic worked no open breach in the constitutional continuity of the Roman state, nor did it lead to any alteration in the Roman theory as to the ultimate location of the sovereign power.

In theory the Princeps was but one magistrate more, and the source of his powers was not different from that of the authority exercised by the other Roman officials.

By conferring upon him separate powers, one after another, the Emperor was made the actual autocratic head of the state, the dictator of its policies and laws. A life tenure of office, which gradually developed, still further added to his influence. But as a matter of abstract law he still possessed all his powers by delegation from the people, and not by reason of any personal right. Moreover, at his death his office became vacant, and the Senate had the power of determining whether or not a new Princeps should be appointed, and if so upon whom the title should be conferred. After election by the Senate, the several proconsular and tribunicial powers were given Augustus by successive statutes. Later, however, it became the custom to confer all these powers by a single

[1] Austin, *Jurisprudence*, Vol. I, p. 530.

act termed the *lex de imperio*, in close analogy with the manner in which the ancient *lex curiata* had vested each king with his authority. This *lex de imperio* is spoken of in the *Institutes* (I, 2, 6) as the *lex regia*, but in all probability was never actually so termed before the third century, when, as Moyle observes,[1] to have avoided the comparison between *rex* and *imperator* would have been mere affectation. This *lex regia* not only conferred upon the Princeps executive sovereignty, but went on to give to his enactments the full force of law, and to release him from the obligation of obeying the laws and *plebiscita* of his predecessors.[2]

From the above, then, it would seem that the *Institutes* in reality repudiate the idea that the Emperor is above the law, for it is declared that each Princeps must individually receive from the people the right to hold himself exempt from obedience to particular laws (*legibus solutus*). The term *legibus solutus* probably proved, however, a very elastic one; and that the emperors soon came to possess and openly to exercise full sovereign power is well known.

Whatever theoretical legislative power may have been ascribed by the lawyers to the people or their comitia, in practice there was none. Augustus passes many of his laws as *plebiscita*, but by degrees the Senate openly assumed the law-enacting power so that from the time of Tiberius, except for the laws conferring the tribunicial power, but one instance of a law passed in the old way is found.[3] Early in the third century Ulpian was able to write concerning the imperial power, "Cum lege regia,

[1] *Imperatoris Justiniani Institutionum*, Vol. I, p. 42.

[2] There is extant a fragment of the *lex de imperio* of Vespasian of 69 A.D., discovered in Rome in 1342. According to this fragment the Emperor is given the authority to enter into treaties, and issue laws, to bring matters before the Senate and compel a vote, to appoint magistrates, etc.

The analogy between the *lex de imperio* and the ancient *lex curiata*, or *vetus lex regia* as Livy calls it, is denied by some authorities. *Vide* Amos, *History and Principles of the Civil Law of Rome*, p. 77.

[3] This was the Agrarian measure of Nerva.

quæ de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat." [1] The transference of sovereignty to the Emperor is thus described as complete, but its original source is still spoken of as in the people.

It would appear that in giving to *senatus consulta* the character of *leges*, Roman constitutional theory was violated. "A senatorial decree," says the *Institutes*, "is what the Senate commands or appoints; for, when the people of Rome became so increased that it was difficult to assemble them for the enactment of laws, it seemed right that the Senate should be consulted instead of the people." [2] This reason, true enough, though hypocritically given, would seem to confess that the old theory of popular legislative power was definitely abandoned. It is possible, however, that the practice was harmonised with the theory by referring to the fact that the Tribunes, the representatives of the Plebs, had seats in the Senate and had the power of arresting all proceedings by a simple veto. Thus, it may have been argued, that by assenting to the *consulta* of the Senate, the Plebs, through their representatives, gave their concurrence.[3]

At any rate, however this may have been, the Senate from the time of Tiberius became the real legislative organ of the Roman state.[4]

This, of course, meant, in practice, that the will of the Emperor became the source of law; for the Senate was almost always wholly controlled by him, and seldom acted without his suggestion and approval.

Aside from thus acting through the Senate, the Emperor had technically no more power to create law than

[1] *Digest*, 1, 41. [2] *Institutes*, I, 2, 5.

[3] Cf. Austin, *Jurisprudence*, Vol. I, p. 530.

[4] It is not to be understood, however, that the *senatus consulta* were not regarded as laws before the time of Tiberius. Cicero expressly puts them upon an equality with *leges*. It was only from the time of Tiberius that the *consulta* took the entire place of *plebiscita*.

the Consuls or Tribunes. By a variety of evasions and fictions, however, he did often manage to exercise a direct legislative power. Taylor gives such a succinct account of this that we can do no better than to follow his language: "Under the Republic, the phrase of *leges datæ* was used to denote bodies of law drawn up at Rome by the Prætor on the request of the people (sometimes needing ratification by the assembly and sometimes not), or codes of law drawn up by provincial governors and others (*e.g. Leges Rupiliæ* for Sicily) or generally laws made by any magistrate *cum Imperio* (*e.g.* Sulla, etc.) in virtue of delegation by the people, in opposition to laws passed directly by the people (*leges rogatæ*). This right *dare leges* passed into the Emperor's hands, and such *leges datæ* were issued dealing with many different matters, *e.g.* the conferment of the citizenship, or bestowal of Latin rights on provincial towns, and the municipal organization of the colonies and municipia. Moreover, the Emperor exercised legislative power by certain indirect means, *e.g.* by interpretation of the law, to which jurists have given the term *constitutio principis*, such interpretation always carrying the force of law. The interpretation might be conveyed either in a *decretum*, a judicial sentence of the Emperor, or a *rescriptum* (also called *epistola*), a written answer given by the Emperor on a definite point, in both of which cases the decision had the force of law in all analogous cases that might afterwards arise; or lastly, in the *edictum*, a general ordinance (like the Prætor's edict) issued by the Emperor to all citizens and foreign subjects of the Empire." [1]

[1] *Constitutional and Political History of Rome*, pp. 436–437. This power of issuing decrees, rescripts, epistles, etc., which had the force of law, was that conferred upon him by the so-called *lex regia*. Thus, to quote again the famous paragraph of the *Institutes:* "The ordinance of the prince hath also the force of law; for the people by the *lex regia* make a concession to him of their whole power. Therefore, whatever the emperor ordains by rescript, decree or edict is law. Such acts are called constitutions." I, 2, 6.

In all of the above cases, however, the legislative power of the Emperor was exercised rather for the fresh interpretation of laws than for the creation of new legal principles or rights. All important legislative changes were made in the form of *senatus consulta.*

The presence of the conception of popular sovereignty in the selection of magistrates and the enactment of laws has been shown. The same idea is to be found in other parts of Rome's constitutional practice. The giving to the people the right of final judgment in criminal cases shows this. Also they were declared to be the source of all special honours. Dionysius and Cicero report the tradition that the kings of Rome were not allowed to assume the royal insignia of Etruria without the consent of the Senate and of the people, and that the appointment of officials by the kings for special purposes required the ratification of curial laws.[1]

Conclusion

In conclusion of this chapter it may be asked: In what sense did the acceptance by the Romans of the theory of popular sovereignty commit them to the "social compact" theory which was later to become so influential in political thought?

By the Romans the state was termed the *Civitas.* The state and the aggregate of its citizens were thus conceived of as the same thing. Therefore, of necessity, no distinction was made between what the state willed and what the people willed. So also, as flowing from this, no distinction as to essential character was made, or could be made, between laws public and laws private. *Leges publicæ* and *leges privatæ*, were to them distinguishable only by the fact that, as the *Institutes* state, "Public law regards the state of the commonwealth; but private law . . . concerns the interest of individuals."[2]

[1] Dionysius, III, 62; Cicero, *de Rep.*, II, 17.

[2] I, 1, 4.

This identity in Roman thought between the *civitas* and the ensemble of the *cives* is brought out in an excellent manner by von Ihering in his *Geist des römischen Rechts.*[1] This identity, however, he goes on to explain in the terms of the social compact theory. "From the point of view of the subjective principle," he says, "the political community appears as a contractual relation. The good accord which exists between the individuals is the consequence of a compact, express or tacit. Peace (*pax*) results from a *pactum.*" And a little later on he says: "The will of the state is the will of the aggregate of its citizens. Law is a contract by which these citizens mutually obligate themselves to observe a certain mode of conduct: right, in the objective sense, is the obligation of all which results from this. The subject of the legislative power is not the state envisaged as a fictitious being placed above the citizens; it is the individuals. The primitive form of the law is not a command or prohibition addressed to subordinates; it is a convention concluded between equal persons. Right, in the objective sense, is derived from this convention. Law, therefore, is nothing else than a form of obligation which applies to the whole people. As in the case of a private obligation, it necessitates a question and an answer; the people are asked (*rogatus*) and respond by their vote. Thus it is with precise truth that the Roman jurist, looking to this primitive aspect of the law, terms it *communis reipublicæ sponsio* (Papinian L., I, *de Leg.* 1, 3). . . . In its origin a law and a contract are not distinguishable by their intensive efficacy, but only by their sphere of application. . . . The *lex publica* is a convention of all with all; and, conversely, a private contract is an agreement between two. . . . The effect of the law for the individual is that of a contract to which he has himself assented." In a note to this Ihering adds: "It makes no difference that he may have voted against the law or have taken no part in its enactment. If he

[1] Bk. I, title 1, ch. II, § 18.

remains in the state he recognizes that it is obligatory upon him."[1] Finally, concluding the paragraph, the German professor says: "It would seem almost as though the ancient Roman law might serve as a proof of the truth of the 'Natural Rights' theory of the state."[2]

The foregoing interpretation of the Roman conception of popular sovereignty in terms of a social compact is, we think, not quite correct. Though the Romans looked upon law as, in theory at least, resting upon the assent of the whole burgess body, they never developed the idea that the state itself owed its existence to a social compact such as Rousseau and his school imagined. Laws they held might create a contractual relation between individuals, but the state they never conceived as the product of an agreement or convention. That is to say, they never had that individualistic conception of political right which makes all authority and the exercise of all political power dependent upon a consent, express or tacit, generally given by all the citizens. Of a possible non-civic or "natural" state they seemed scarcely to have formed an idea. To the Latins, as to the Greeks, the existence of a political rule of some sort was of such obvious necessity, so self-evidently rational, and therefore so "natural," that the search for an abstract justification for its existence was not attempted. As being thus rationally demanded by men's very nature, the state was never viewed as anything so artificial as to require a formal conventional act for its establishment. It was not viewed, indeed, as we have seen, as an entity independent of and distinct from its

[1] For the invalidity of the reasoning of this last sentence, see the author's work, *The Nature of the State*, ch. VI, especially pp. 126–128. Ihering, indeed, himself makes evident its fallacy in his very next paragraph in which, in portraying the hopeless condition in the ancient world of the outlawed man, he shows how practically valueless to the individual would be his liberty to depart from the state whose laws he might not be willing to accept. For a further criticism of Ihering upon this point see Borgeaud, *Histoire du Plebiscite*, pp. 81 *et seq.*

[2] *Op. cit.*, Bk. I, ch. II, § 18.

citizens. Its law was self-imposed, but was not looked upon as having for its aim the protection of natural rights of life, liberty, and property already possessed by the individual. On the contrary it was consistently held that all private rights were the creation of law. The only idea of personality known to the Roman law was that according to which the individual was the possessor of a group of legal rights. The only liberty, therefore, which the Roman ever had, or thought of, was liberty under the law — the right to be protected in the exercise of those private rights which the law recognised and defined. There was therefore no original basis of natural right upon which the idea of a social compact could have been founded.

The theory of a governmental compact, however, the Romans did develop.[1] In so far as they held the view that public officials received their authority from the people, acted as their agents, and were responsible to them for the manner in which they exercised the functions of their offices, they necessarily accepted this theory. That they did so interpret the relation between themselves and their rulers we have already seen. Even the Princeps was alleged to have received his legislative authority from the people by their *lex regia*, — a grant of power, however, which was interpreted as an absolute *translatio* to him of their sovereignty, not as a mere *concessio.* The power once granted could not legally be withdrawn by the people from the Emperor upon any pretext whatsoever.

[1] For the distinction between the social compact and governmental compact theories, see the author's work *The Nature of the State*, ch. IV.

CHAPTER XVII

THE RATIONALISING OF THE ROMAN LAW

We have spoken of the fact that the laws of the Twelve Tables were the first Roman *leges* in the strict or positive sense of the term. Not only were they the first statutes properly so-called, but they were conceived by the Romans to embrace the entire body of their private law. Henceforth, in theory, their law was to grow only by interpretation or express statutory additions. In the future, law was to be the command of the state, that is to say, of the people who constituted the state. No rule of conduct, whatever its moral character, was to be accepted as establishing a legal principle unless it could make good its claim to express the will of the Roman people. In general this will was to be declared through some one of the formal legislative organs. As has been already mentioned, custom was sometimes recognised as a source of law, and to it was at times ascribed even the power of abrogating a law. That is to say, a law long in disuse might be treated as tacitly repealed.[1]

During all the changes and development which the *jus civile* underwent till the time of its final codification, the provisions of the original decemviral legislation were regarded, in theory, as remaining in full force. How

[1] Some of the jurists justified this law-creating force of custom by treating it as an expression of the will of the legislatively sovereign people. Thus, Julian, in *Digest*, 1, 3, 32, 1: "Nam cum ipsæ leges nulla alia ex causa nos teneant, quam quod judicio populi receptæ sunt, merito et ea, quæ sine ullo scripto populus probavit, tenebunt omnes; nam quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis? Quare rectissime etiam illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur."

these laws could be, and were, added to and modified by *plebiscita*, comitial enactments, and, later, by *senatus consulta* and the *constitutiones* of the emperors, we have already seen. In all these cases the additions were made by the regular legislative organs of the state. We have now to speak, however, of certain elements that entered Roman judicial thought which partook of an entirely different character, — elements that owed their origin to no formal expressions of the will of the Roman people, and which were of such importance that it was almost wholly through their influence that the technical *corpus juris civilis* of Rome was able to take on those excellences which finally fitted it to become the law of a world-state, and, after the dissolution of that state, to serve as the basis for nearly all of the legal systems of modern Europe. We speak of course of the *jus gentium* and *jus naturale*.

"When primitive law has once been embodied in a code," says Sir Henry Maine, "there is an end to what may be called its spontaneous development. Henceforward the changes effected in it, if effected at all, are effected deliberately and from without."[1] If, then, a given code is conceived to embody the entire law of the people, and if, moreover, there is ascribed to it a final or sacrosanct character, the danger is obvious that the nation concerned will have provided itself with a legal straight-jacket. Custom, which is the spontaneous creation of a people acting along those lines of least resistance which its economic and political needs lay down, being no longer efficient as a source of binding rule, a developing nation so circumstanced must find elsewhere the means of satisfying the demands of new social conditions. Statutory enactments may partly supply this need; but, even in modern times, when legislative machineries have been so perfected, this source is never able by itself to satisfy the legal requirements of a growing nation. Interpretation

[1] *Ancient Law*, Am. ed., p. 20.

by jurists and by courts may be adequate for the task, but to be so it must be governed by broad, liberalising principles, not by narrow, technical rules.

The need for some liberalising, rationalising element was especially urgent in the case of the Roman law as codified in the Tables. As there laid down, its principles were peculiarly narrow and technical. Because of the religious origin of many of its provisions, as well as because of that exclusiveness and formality which, characteristic of all early law, was especially pronounced in the case of the Roman jurisprudence, the *jus civile* in its original form was extremely technical. The slightest divergence from the strict letter of its provisions was destructive of a man's right, whatever the equity of his case might be. Added to this was the fact that the respective legal rights and capacities of the different classes of freemen and slaves, Patricians and Plebeians, Citizens and Peregrins, differed widely. The Prætorian edicts, the responses of the Jurisconsults, and the constitutions of the emperors were the agencies by which the *jus civile* discarded most of these technicalities, abandoned its exclusiveness, and assumed a rational liberal character. For the purpose of a history of political ideas it is, of course, not necessary to trace in any detail this process of development. The interest lies in the discovery and statement of those theories of law and political right by which the Prætors, the Jurisconsults, and the emperors were controlled in their liberalising legislation.

The Prætor's Edict

With the establishment of the Republic, the component powers of the imperium were distinguished and distributed among a variety of officials, — the Consuls, the Pontifices, the Dictator, and the like. From time to time, also, urged on by the demands of the Plebs and by the exigencies of changed political conditions, new political functions were differentiated and additional offices created.

In 366 B.C. the Prætor was first appointed and given the civil judicial powers which the Consuls had previously exercised. In 242 B.C. another Prætor was appointed to administer justice in suits in which foreigners were concerned. As such he became known as the Prætor Peregrinus, the old Prætor receiving the title Prætor Urbanus. For the present we shall speak only of the work of the city Prætor, reserving for later mention the important part played by the peregrinal judge in the development of the law.

The Urban Prætor was purely a judicial officer, and administered, of course, the strict *jus civile*. But in applying the law he necessarily had to construe it (*jus dicere*), and in doing this it became inevitable that new law should be created and new principles established. The practice of the Prætors in issuing edicts at the beginning of their terms of office greatly facilitated this. These edicts contained the principles by which the Prætors issuing them declared they would be governed in the administration of their offices. The edicts were, of course, not statutes, for the Prætors had no direct legislative power. Until the *Lex Cornelia* of 67 B.C., indeed, it was not absolutely compulsory upon the Prætor to follow in all cases the terms of his own edict. Moreover, such force as the edict had disappeared with the expiration of the year's term of office of the Prætor issuing it.

Notwithstanding all this the Prætorian edict did become an important source of law. Each succeeding judge, though not bound to do so, naturally followed, in the main, in his edict, the terms of that of his predecessor. Thus, new principles, tentatively accepted, tended to become fixed, and at the same time, new edicts being issued every year, the opportunity and temptation was very great to introduce principles slightly modifying the strictness of the old *jus civile* and bringing its provisions more nearly into accord with new conditions of fact and changed theories of justice and legal right. Moreover, in

the power which the Prætor possessed of allowing or disallowing actions, and of applying particular legal remedies, something that came very near to a legislative authority was involved. Thus, as a result of all these factors, already in the time of Cicero the edict had come to be looked upon as a sort of law, though not confounded with the strict *jus civile*.[1] As created under magisterial authority it was known as *jus honorarium*.[2]

In 131 A.D. the great jurist Salvius Julianus, at the request of the emperor Hadrian, revised the Prætorian edicts,[3] and this revision was definitely enacted into law as a *senatus consultum*. This codification of necessity put an end to the power of the Prætors to develop law, by making it no longer their duty to issue edicts of their own. But Prætorian law had already done a great work in liberalising and rationalising the strict *jus civile*. The very manner in which its principles had been created had rendered it inevitable that, whenever possible, whether by fictions or otherwise, equitable rules should be substituted for the rigid requirements of the older law. The demonstration of this, as seen in the particular modifications of both the substantive and adjective principles of the Roman law thus brought about, belongs, however, rather to the writer upon law than to the historian of political ideas.

The Jurisconsults and the Jus Naturale

A second source through which the old Roman law secured a beneficent development was the "responses," and writings of its learned jurists.

[1] See Cicero, *in Verrem*, II, 1, 45.

[2] "The edicts of the prætors are also of great authority. These edicts are called the honorary law because the magistrates who bear honours in the state have given them their sanction. The curule ædiles also, upon certain occasions, published their edicts which became part of the *jus honorarium*." *Institutes*, I, 2, 7.

[3] Both the urban and the peregrinal, and those of the provincial governors.

In republican times it had been the custom for the college of pontiffs every year to appoint one from their number to give official answers to such questions of private law as might be propounded to him. By these answers the judges were absolutely bound. After the establishment of the Empire the custom arose of seeking legal information from others than the pontiffs. Answers thus secured were of course not authoritative, however learned the jurists giving them. The emperor Augustus, however, established the practice of conferring upon particular individuals especially learned in the law a *jus respondendi*, and the *responsa* thus given *ex auctoritate ejus*, became practically controlling upon the cases in which given. In the course of time this authoritativeness was extended to subsequent cases involving the same points of law. Hadrian gave to this practice his special sanction. In this way this scientific legal literature came to constitute a very important source of law, — a source that is recognised in the *Institutes* in the following language: "The answers of the lawyers are the opinions of persons authorised to give answers on matters of law. For anciently public interpreters of the law were licensed by the emperors and called *juris consulti:* and their opinions obtained so great an authority that it was not in the power of a judge to recede from them."[1]

The special value of the work of the consults in developing the *jus civile* lay not so much in the new substantive principles which they introduced, for in theory indeed they had no power to modify the law, as in the exact terminology and logical classifications which they employed, and in the liberal, rational spirit in which they did their work. By means of their exact definitions and the classifications logically dependent upon them, they reduced to firm principles the doctrines which the Prætorian edicts had developed, and built them and the old *jus civile* into a scientific system of jurisprudence. In searching for the real intent of the law rather than its technical require-

[1] I, 2, 8.

ments they breathed into the whole legal *corpus* the spirit of reason and justice.

In this last office they were greatly guided and assisted by the Stoic doctrines of Natural Law which had by their time worked their way into Roman thought from the Greeks. From the time when Rome had first been brought into military touch with Greece the influence of her philosophy upon her conquerors had been very great, and already by the time of Cicero the metaphysics of the Academy and the ethics of the Stoics furnished the basis for philosophic thought at Rome.

Favoured by most of the emperors and studied by the learned, Stoicism exercised an even greater influence under the Empire than it had done during the last years of the Republic. In this alliance between Greek and Roman thought the lawyers especially participated, and this participation was manifested everywhere in the scientific legal literature which they created. Through their influence it became an accepted doctrine of Roman judicial thought that, back of particular rules of justice, there lie abstract natural principles of right which, because of their essential justice and rationality, are everywhere and at all times ethically binding upon men: that, back of the sanction supplied by the state to its laws, there is the authority which Nature impresses upon all her rules. The true ethical standard, the jurists continually declared, is one to which civil rulers should approach as near as may be. Thus Ulpian defined justice as "constans et perpetua voluntas jus suum cuique tribuendi," and declared it to be the aim of the law to enable every one, "honeste vivire alterum non lædere, suum cuique tribuere." Jurisprudence he defined as "justi atque injusti scientia"; and, referring to the duties of the jurists, says: "Justitiam namque colimus, et boni et æquæ notitiam profitemur; æquum ab iniquo separantes, licitum ab illicito discernentes."[1]

[1] *Digest*, 1, 1, 1. Paulus says, "Id quod semper æquum et bonum est, jus dicitur, ut est jus naturale" (*Digest*, 1, 1, 11). Celsus says, "Quæ

The extent of the Stoic influence upon Roman jurisprudence is not to be found, however, by determining the number of specific rules in which a Stoic dogma is clearly stated. Rather it is to be discovered in the general spirit of reason and justice which its doctrines breathed into the law. As Maine observes: "The strength of Stoicism resided not in its canons of conduct, which were often repulsive and ridiculous, but in the great, though vague, principles which it inculcated of resistance to passion. Just in the same way the influence on jurisprudence of the Greek theories which had their most distinct expression in Stoicism, consisted not in the number of specific positions which they contributed to the Roman law, but the single fundamental assumption which they lent it."[1]

The Jus Gentium and the Jus Naturale

By the third century B.C. the foreign trade of Italy had so increased, and the number of aliens residing in the peninsula had so grown, that it became an absolute necessity that some legal principles should be developed for the regulation of dealings between Romans and aliens, and between the resident aliens themselves. The Roman *jus civile* was inapplicable, for as we have already noted, it was an established principle of that law that only the citizens who had created it were entitled to the enjoyment of its principles. Foreigners, therefore, aside from special treaty provisions, had no rights under it. Nor did the laws of the states from which the aliens came seem available. As between foreigners and Roman citizens, of course, it would not be accepted; and even as to suits in which all the parties concerned were aliens, the case was no better. Actuated no doubt by the thought that it would imply some sort of degradation for a Roman magistrate to apply

verum natura prohibentur, nulla lege confirmata sunt" (*Digest*, 50, 17, 188).

[1] *Ancient Law*, Am. ed., p. 53.

upon Roman soil laws neither created nor sanctioned by Roman authority, the Romans would not accept the alien law for any purpose.[1]

In this exigency the peregrinal Prætors were led gradually to develop a system of law at first peculiar to their own jurisdictions, but later embodied in the general body of the civil law. Regarding the exact source and character of this law which came to be known as the *jus gentium* there is considerable dispute among historical jurists. These are not agreed either as to the source whence were drawn the substantive principles which it contained, or the exact ground upon which it claimed the sanction of the Roman state. The most widely known and accepted theory upon these points is that given by Savigny, Austin, and Maine.

Referring to the necessity which the Prætors were under to discover some system which should be applicable to foreigners, Maine says: "The expedient to which they resorted was that of selecting the rules of law common to Rome and to the different Italian communities in which the immigrants were born. In other words, they set themselves to form a system answering to the primitive and literal meaning of *jus gentium*, — that is, law common to all nations. *Jus gentium* was, in fact, the sum of the common ingredients in the customs of the old Italian tribes, for they were all the nations whom the Romans had the means of observing and who sent successive swarms of immigrants to Roman soil. Wherever a political usage was seen to be practised by a large number of separate races in common it was set down as part of the law common to all nations, or *jus gentium*. Thus, although the conveyance of property was certainly accompanied by different forms in the different commonwealths surrounding Rome, the actual transfer, tradition, or delivery of the article intended to be conveyed was a part of the ceremonial in all of them. It was, for instance,

[1] This is the explanation given by Maine.

a part, though a subordinate part, in the mancipation or conveyance peculiar to Rome. Tradition, therefore, being in all probability the only common ingredient in the modes of conveyance which the jurisconsults had the means of observing, was set down as an institution *juris gentium*, or rule of law common to all nations. A vast number of other observances were scrutinised with the same result. Some common characteristic was discovered in all of them which had a common object, and this characteristic was classed in the *jus gentium*. The *jus gentium* was accordingly a collection of rules and principles, determined by observation to be common to the institutions which prevailed among the various Italian tribes."

"The circumstances of the origin of the *jus gentium*" Maine continues, "are probably a sufficient safeguard against the mistake of supposing that the Roman lawyers had any respect for it. It was the fruit in part of their disdain for all foreign law, and in part of their disinclination to give the foreigners the advantage of their own indigenous *jus civile*. It is true that we, at the present day, should probably take a very different view of the *jus gentium*, if we were performing the operation which was effected by the Roman jurisconsults. We should attach some vague superiority or precedence to the element which we had thus discerned underlying and prevailing in so great a variety of usage. We should have a sort of respect for rules and principles so universal. Perhaps we should speak of the common ingredients as being of the essence of the transaction into which it entered, and should stigmatize the remaining apparatus of ceremony which varied in different communities, as adventitious and accidental. Or, it may be, we should infer that the races which we were comparing at once obeyed a great system of common institutions of which the *jus gentium* was the reproduction, and that the complicated usages of separate commonwealths were only corruptions and depravations of the simpler ordinances which had once regulated

their primitive state. But the results to which modern ideas conduct the observer are, as nearly as possible, the reverse of those which were instinctively brought home to the primitive Roman. What we respect or admire, he disliked or regarded with jealous dread. The parts of jurisprudence which he looked upon with affection were exactly those which a modern theorist leaves out of consideration as accidental and transitory: the solemn gestures of mancipation; the nicely adjusted questions and answers of the verbal contract; the endless formalities of pleading and procedure. The *jus gentium* was merely a system forced on his attention by a political necessity. He loved it as little as he loved the foreigners from whose institutions it was derived and for whose benefit it was intended. A complete revolution in his ideas was required before it could challenge his respect."[1]

This revolution in ideas, Maine goes on to say, was brought about by that same theory which had assisted the urban Prætors and the jurisconsults in their liberalising of the law. Just as under the influence of Greek ideas the Romans had come to look upon the more equitable portions of their own *jus civile* as resembling the natural equity of the Stoics, so, in observing the *jus gentium* developed by the foreign Prætors, they came to see in it the characteristics of a true *jus naturale*. Because it exhibited no technicalities, because it was free from personal distinctions, because it seemed spontaneously the common creation of different nations, because an abstract justice characterised all its provisions, this body of law seemed to approximate to that perfect law which reason itself required, to resemble that natural law which is universally valid as an ethical standard to which all civil laws should conform. Thus it came about, says Maine, that the terms *jus gentium* and the *jus naturale* as they were used by Roman lawyers came to mean practically the same thing.

[1] *Ancient Law*, ch. III.

The *jus naturale* was but the *jus gentium* viewed in the light of the Stoic philosophy.[1]

To sum up, then, the theory which we have been stating is, that the *jus gentium* of the Prætors was originally "the sum of the common ingredients in the customs of the old Italian tribes," that as such it was distinctively foreign law, and was therefore necessarily viewed in the beginning with disfavour by the Romans, who were only induced to accept it as a lesser evil than the extending to foreigners of their own civil law; that, however, as they began to deal more scientifically and philosophically with their own jurisprudence they gradually came to see in these "gentile" laws those elements of abstract or natural equity which were the characteristics of the *jus*

[1] The words of Maine are: "The *jus naturale* or Law of Nature is simply the *jus gentium* seen in the light of a peculiar theory. An unfortunate attempt to discriminate them was made by the jurisconsult Ulpian —but the language of Gaius, a much higher authority, and the passage quoted before from the *Institutes*, leave no room for doubt that the expressions were practically convertible. The difference between them was entirely historical, and no distinction in essence could ever be established between them." *Ancient Law*, Am. ed., p. 50.

The attempted distinction of Ulpian, to which Maine refers, was copied into the *Institutes*, and is as follows (I, 2, *Introd.*): "The law of nature (*jus naturale*) is a law not only to man, but likewise to all other animals, whether produced on the earth, in the air, or in the waters. From hence proceeds that injunction of male and female, which we denominate matrimony; hence the procreation and education of children. We perceive, also, that other animals are considered as having some knowledge of this law."

The quotation from Gaius is (*Institutes*, I, 1, 1): "Every people governed by law and custom uses law which is in part peculiar to itself and in part common to all mankind. That law which any people establishes for itself is peculiar to itself, and is called the civil law (*jus civile*) as being the particular law of the state. But that law which natural reason has established for all men, is observed by all peoples alike, and is called the law of nations (*jus gentium*) as being that which all nations use." Another quotation from Gaius, which is quoted in the *Institutes* of Justinian (II, 1, 11), is: "Things become the property of separate individuals in many ways; for of certain things we obtain dominion by the law of nature, which, as we have said, is called law of nations; of other things by the civil law."

naturale of Greek philosophy; and that thus, from being a body of foreign, and therefore inferior, law as compared with their own law (*jus proprium civitatis*), the *jus gentium* came ultimately to be accepted as a part of the Roman *jus civile*, and, from an ethical standpoint, to be held superior to the old *jus strictum;* and finally, that thus, from being originally the law common to the Italian nations, it came to be considered as universal law, — the law which should find a place in the jurisprudence of all nations.

According to this theory, then, the term *jus gentium* as it occurs in the *Institutes* of Gaius and in the Justinian code, has not the same meaning that it had when earlier used by the Prætors. As used by Gaius and those following him, it no longer has reference to law actually common to the nations with which Rome had come into contact. Rather its reference is to the divine or natural law which Cicero and the classical jurists had developed.

Coming now to the criticism of this view to which Maine, Austin, and Savigny have lent the support of their names, we find that though attractive in its simplicity it cannot be unreservedly accepted. The *a priori* presumption is that the Romans with their well-known legal exclusiveness would never have consented in the first instance to receive a body of foreign law into their own *jus civile*. This makes it necessary to find if possible some other explanation.

This other explanation is furnished by the theory which holds that the old *jus gentium* was not made up from principles common to the laws of the various Italian tribes, but that it was composed of the rules of the Roman civil law itself which, because of their freedom from technicalities, their abstract justness, or possibly their similarity with the provisions of the laws of the Italians, the Roman Prætors selected as best adapted for application to them. Either because applied to members of different states, or because many of their provisions

were as a matter of fact common to the laws of the Italian tribes, these Prætorian principles came in time to receive the title *jus gentium*. However this may have been, the essential point of this theory is that from the beginning the Romans regarded the *jus gentium* as deriving its authority from the sanction of their own state. Later, because of the liberality and justness of its provisions, it came in part to be identified with the *jus naturale* of the philosophers; but this identification was never required in order that it should be received into the favour of the Roman lawyers, for it had always been acceptable to them. In a certain sense, then, this theory reverses the order of development indicated by the theory first stated. Instead of regarding the *jus gentium* as at first an inferior sort of law which later by identification with the *jus naturale*, comes to be held in high estimation, it declares the *jus gentium* to have been originally regarded as the most equitable part of the *jus civile* and to have been deliberately selected by the Prætors for that reason.

In other words, according to this view the idea of a *jus naturale* abstractly just and universally valid, first arose in the Roman mind. Later there grew up under the Prætor's hands an *abstractum* of the simpler portions of the *jus civile*. These two systems existed for a time side by side until, because of common characteristics, the one came to be considered as partially expressing in the form of specific rules the general provisions of the other. The *jus naturale* thus always was and continued to be something distinct from and wider than the Prætor's *jus gentium*. It was not simply, as Maine asserts, the *jus gentium* viewed in the light of a particular theory. When, therefore, Gaius says that "that law which natural reason has established for all men is observed by all peoples alike and is called the *jus gentium*," he is not to be interpreted as absolutely identifying the *jus gentium* with the *jus naturale*, but only as asserting that those rules which are found to be as a matter of fact common to all systems of

law, must, because of that very universality, be deemed to have been dictated by natural reason.

As further substantiating the position that the conception of a *jus naturale* was developed independently of the *jus gentium*, is the fact that the use of the former term antedates that of the latter. Clark calls attention to the fact that the term *jus gentium* is not met with before the time of Cicero, and indeed even by that author it is not spoken of in his earlier works, in which the idea is expressed in such phrases as *jus naturae*, *jus commune*, etc., which are opposed to "this law of ours"—"hoc civile jus."[1]

In the later works of Cicero the term *jus gentium* occurs, and this is probably the first use made of it in Latin literature. Here it is plainly used as practically equivalent to *jus naturale*, but not as also descriptive of the laws of the Prætors. It is not until later that the jurists, observing the manner in which the qualities of the provisions of the Prætor's edicts corresponded with the characteristics predicated of the *jus naturale*, applied the term *jus gentium* to that particular part of the *jus civile* which the Prætors administered.[2]

[1] In his *de Inventione* (*circa* 80 B.C.), for example.

[2] Clark, *Practical Jurisprudence*, pp. 357 *et seq.*, says: "In the first book of the *de Legibus* [of Cicero] partly written in 52 and partly in 46 B.C., we find the *jus universum* and *jus naturæ* predominant. This work is based on Plato and the earlier Stoics. A 'statute of nature, the common law of nations' is spoken of in the speech *de Haruspicum Responsis*, 56 B.C.; and the same ideas coupled together are distinguished from the statutes of individual peoples in the *de Officiis*, written in 46 B.C. The book from which this last quotation is made has been considered to be especially inspired by Posidonius, Cicero's own Stoic teacher. The works of the school, to which this philosopher belonged, have only come down to us in brief fragments, and I cannot quote any original *νόμος ἐθνῶν*; but I consider that the idea of the expression may very probably have been borrowed from the later and more practical Stoics. Taken as a whole, Cicero's, which seems not improbably to have been the first *jus gentium*, is, in its origin ideal; rather Austin's 'standard to which in the opinion of the writer, law should conform,' than 'that portion of the positive law which is a constituent part of all positive systems.' It is something which should rightly, but may not actually, form part of the law of a particular nation. Springing from the 'partnership of all man-

Having adverted to the foregoing, Clark concludes: "If the above views be correct, the *jus gentium* of the Romans did not begin either avowedly or virtually with an *abstractum* from the laws of other nations considered together with those of Rome. Probably very few of the rules to which the name was applied were actually introduced from extraneous practice. That the name originally indicated a non-practical and philosophical idea is, I think, sufficiently proved. When applied to an actual system of law, as the idea in question was based upon a supposed natural (therefore universal) sense of fairness and reasonableness, the name was confined to such part of that system as was specially fair and reasonable, *i.e.* the *jus prætorium*. Whether a Roman jurist, after this application, would have recognised any rule as a part of the *jus gentium* in its later and more practical sense which did not in some shape enter into the Roman system is, I think,

kind,' it forbids the sharp practice which a national law will often allow. It is, in fact, little removed from that purely theoretical law of the older Stoics to which I have referred above; and which the ancients themselves regarded as tending more to dissolve than to hold together actual human communities."

"How this theoretical idea passed into a comparatively practical one," Clark continues, "is not difficult to see. The great jurists of the best period of Roman law were necessarily more acquainted with actual jural systems than Cicero, as system and orderly arrangement had been largely introduced since his time. They found the *jus civile* in its wider sense opposed to the philosopher's law of nature or of nations, with its high ideals of justice and benevolence, its assumption of a common moral sense, and consequent fellowship of all mankind. These latter views were too vague and indefinite to occupy much of the attention of practical jurists. The theoretical *jus gentium* therefore becomes more and more identified with parts of existing systems in general, and in particular with that part of the Roman system which turned, from the old national rules, towards reasonableness and equity. It would perhaps be more correct to say that the former theory of the *jus gentium* was replaced by a new one; for the later classical jurists probably concerned themselves as little with the examination and comparison of different actual systems as did Cicero and the Stoic teachers."

We shall have occasion to consider specially Cicero's political theories in a later chapter.

doubtful. The whole of the *jus gentium* was probably part of the Prætorian law, though I question whether the two are coincident, since certain provisions of the latter were evidently considered more strict and inequitable than others."[1]

That the *jus naturale* and the *jus gentium* were constantly distinguished in thought, and often even in substance, appears from a number of expressions in the earlier as well as the later legal literature of Rome. Thus Florentinus says, "Slavery is an institution of the law of nations by which a man is subjected to the dominion of another, contrary to nature." This declaration is restated in the *Digest* of Justinian. Ulpian is still more explicit, though he bases his distinction upon a wrong conception of the natural law, when he says, "The law of nations is that which the races of men use, and we can easily understand that this is different from natural law, because the former is common to all animals, the latter only to men." This assertion is likewise reproduced in the *Digest*. The *Institutes* also quotes from Ulpian the sentence, "We must, therefore, say as to private law that it is tripartite, for it is collected either from natural precepts, or from those of nations or from civil precepts."[2]

Conclusion

Whatever the source of the Prætor's *jus gentium*, or its relation to the *jus civile*, the general character of its provisions is well enough known. Even if originally existing as a distinct set of laws, it came in course of time to be fully absorbed into the body of the Roman law. The urban Prætors borrowed it from the peregrinal judges, and the jurists utilised it under the names *jus æquum* and *æquitas*. Thus the real distinction between the *jus civile*, in its narrow strict sense, and the *jus gentium*, tended constantly to disappear until the only real purpose that the

[1] *Op. cit.*, p. 360. [2] I, 1, 1.

two names served was to indicate the source whence, or the historical circumstances under which, the gentile law had been developed.

The aggregate influence exerted upon the whole civil law of Rome by the development and incorporation into it of this great body of liberal principles it is impossible definitely to state. It is perhaps sufficient to say, however, that it was very largely through this means that the Roman law from being a system of rules for the exclusive regulation of relations between citizens of a particular state, became a system of jurisprudence for the government of mutual interests of men ; that from being a body of law for a city, it became broad enough, liberal enough, to serve as legal system for a world-state, and to furnish definitions and principles upon which systems of law for the most developed of nations centuries later might be founded.

In accepting and developing the idea of a *jus naturale*, the Romans admitted to their political and judicial thought that one ethical ideal that was needed for making their law a system of essential, as well as of formal, justice. At the same time they never for a moment weakened the distinction between law and morality, — between what was law and what ought to be law. The natural law, of which they came to believe the *jus gentium* to be a partial expression, they constantly described as being universally binding, and of such essential validity that no civil laws could derogate from its authority ; yet they never once admitted that a *lex naturæ* might be set up by a suitor in a court of law as a defence against the application of a provision of the *jus civile*.[1]

[1] Voigt calls attention to the fact, observes Muirhead, "that the risk which arose from the setting up of the precepts of a speculative *jus naturale* as derogating from the rules of the *jus civile*, was greatly diminished through the position held by the jurists of the early empire. Their *jus respondendi* made them legislative organs of the state, so that in introducing principles of the *jus naturale* or of *æquum et bonum*, they at the same moment positivised them and gave them the force of law." *Private Law of Rome*, p. 301.

Nor, controlled by the same practical sense, did they ever set up the political state as antithetical to an original state of Nature in the manner in which did the writers of the seventeenth and eighteenth centuries. Occasionally, however, we do find a reference to an original "state of Nature." Some of the Stoics, Posidonius, for example, had identified this original age with the golden age of mythology, and this must of course have been known by the Romans. In the *Institutes* of Justinian we find the following: "There are various means by which things become private property. Of some we obtain dominion by the law of Nature, which (as we have already observed) is also called the law of nations (*jus gentium*); of others by the civil law. But it will be most convenient to begin from the more ancient law, that law which Nature established at the birth of mankind; for civil laws could then only begin to exist when cities began to be built, magistracies to be created, and laws to be written."[1]

In general, however, it is safe to say that the Roman jurists laid no emphasis upon this idea. Certainly they never looked upon it as furnishing any possible ground for questioning the legitimacy of the rule of any *de facto* state.[2] The *jus naturale* they looked upon, not as a code that had ever actually obtained among any people, but only as an ideal or moral law to which all civil laws should approximate as near as might be.

Note

The following opinions of historians of the Roman law regarding this much disputed point as to the exact relation between the *jus civile*, *jus gentium*, and *jus naturale* will be of interest. They represent, in some respects, opinions different from those described in the

[1] I, 1, 11.

[2] Maine says (*Ancient Law*, p. 70): "The jurisconsults do not speak confidently of the existence of such a state [of Nature] which, indeed, is little noticed by the ancients except where it finds poetical expression in the fancy of a golden age."

text, but the divergencies are hardly of sufficient importance to warrant a particular discussion of them.

Muirhead (*Private Law of Rome*, p. 240): "The Roman *jus gentium* was not built up by the adoption of one doctrine after another that was found to be generally current elsewhere. In the earliest stages of its recognition, it was an independent, international, private law, which as such regulated intercourse between peregrins, or between peregrins and citizens on the basis of their common *libertas;* which during the republic was purely empirical and free from the influence of scientific theory, but whose extensions in the early empire were a creation of the jurists — a combination of comparative jurisprudence and rational speculation. To say that it was *de facto* in observance everywhere is inaccurate; on the contrary, it was Roman law built up by Roman jurists, though called into existence through the necessities of intercourse with and among non-Romans. Cf. Voigt, *Jus. Nat.*, II, 661."

Nettleship (*Contributions to Latin Lexicography*, p. 508): "I believe that the *jus gentium* meant the usage of the world, of all mankind, and that it was in all probability first employed as a quasi-technical expression by the lawyers of the second century B.C., Cicero Majores. They originally intended to express by it such customs or usages as the Romans found, in the experience which they would pick up away from Italy, in war or commerce or travel, or in their intercourse with peregrins in Italy itself, to be universally observed. These usages would naturally be connected in the main with war and commerce. . . . The sea, being the property of no state or person in particular, is *juris gentium*. . . . I cannot agree with Puchta that the *jus gentium* was exclusively a product of the Roman law, applied to the dealings of the Romans with the peregrins who came to Italy. This theory seems to me too narrow, because it ignores the fact that while, after the First Punic War, many foreigners came to Italy and Rome, many Romans and Italians also went abroad, and came into constant contact with the inhabitants of Greece, Macedonia, Syria, and Africa. In the numerous details of commerce and general intercourse which would be brought across his path, the Roman would find some practices or usages universally prevalent, and these he referred to the category of *jus gentium*. Such importance had they assumed in the eyes of the jurists of the second century B.C. that *jus gentium* was formally distinguished from *jus civile*, as universal, informal, often unwritten usage, to special, formal, recorded enactments." "*Lex naturæ* and *jus naturale* are philosophical phrases imported from Greece. Voigt has, in my opinion, correctly conceived the difference between *jus naturale* and *jus gentium* where they differ. *Jus gentium* is usage actually existing everywhere; *jus* or *lex naturæ* is ideal law, a law which may or may not exist in universal practice, but which is in any case to be wished for."

Sohm (*Institutes of Roman Law*, Eng. transl., § 13): "The *jus gentium* was, and never was anything else but a portion of the positive Roman law which commercial usage and other sources of law, more especially the prætorian edict, had clothed in a concrete form. Nor, again, must it be imagined that the Romans simply transferred a portion of foreign (Hellenic) law bodily into their own system. In a few quite exceptional cases where they did so (as *e.g.* in the case of the *hypotheca*) they did not fail to impress their institutions with a national Roman character. The antithesis between *jus civile* and *jus gentium* was merely the outward expression of the growing consciousness that Roman law, in absorbing the element of greater freedom, was commencing to discard its national peculiarities and transform itself from the special local law of a city into a general law for the civilised world. The *jus gentium* was that part of the private law of Rome which was essentially in accordance with the private law of other nations, more especially that of the Greeks which would naturally predominate along the seaboard of the Mediterranean. In other words, *jus gentium* was that portion of the positive law of Rome which appeared to the Romans themselves in the light of a 'ratio scripta' of a law which obtains among all nations and is common to all mankind."

Sohm says, however (§ 12): "It is certain that the contents of the *jus gentium* were largely determined by the example of such law as had come to regulate the rights of the aliens in other commercial centres of the age. The legal convictions of foreign nations struck root in Rome itself and appeared in the form of the *jus gentium*. In addition to this we must not fail to bear in mind that, from this same time onward the ancient national character of Rome was already yielding to the inroads, increasingly powerful, of foreign, more especially Greek, elements, bearing with them the whole accumulated force of Hellenic culture. The whole world came, so to speak, to make Rome its capital, and with it came the *jus gentium*, a law not for any particular state, but universal; a law not merely for a citizen, but for private persons as such." Again, he says (§ 13): "The value of the division of the Roman law into *jus civile* and *jus gentium* was not merely theoretical, but also practical. The law which now governed the intercourse of foreigners — Greek, Phœnicians, Jews — in Rome, was, of course, Roman law, but it was Roman *jus gentium*, and the Roman *jus civile*, in the new and narrower sense of the term, was confined on principle to the mutual dealings of Roman citizens. The *jus gentium* was thus at the same time the Roman law for foreigners, *i.e.* the law which governed the transactions of the peregrini. And it was but natural that such should be the case, since it was the influence of foreign intercourse that had given the *jus gentium* its shape."

Munro Smith (Review of Bryce's *Studies in History and Jurispru-*

dence, Pol. Sci. Quar., XVII, 521): "The reviewer is not able to share the author's conviction that the development of this body of law (*jus gentium*) antedates the establishment of the peregrine prætorship. What little evidence we have indicates that prior to the middle of the third century B.C. the peregrine who obtained legal protection at Rome, whether through a *hospes* or a patron, or by virtue of treaty, was protected according to the rules of the Roman civil law. There is no evidence that *jus gentium* was ever applied, even at a later period, to any peregrines except those who were subjects of Rome. It accordingly seems probable that the *jus gentium* was worked out after the conquest of Sicily and simultaneously with the establishment of provincial government. When whole peoples were deprived of their previous political organisation and converted into Roman subjects without receiving Roman citizenship, new law was for the first time needed. The protection of the Roman civil law could not be extended to these by treaty, for they had no state organisation with which treaties could be made. These dediticii, however, could not be left without protection; and such protection was given them at home by the provincial governors, and at Rome by the peregrine prætor. These magistrates had to make their own laws, and they, or rather the jurists in their councils, gradually made the *jus gentium*."

Amos (*Roman Civil Law*, p. 48): "It was probably not until the days of Cicero that the notion of *jus gentium* began to be merged in that of a *jus naturale* or law of nature. It is certain from repeated allusions in Cicero's writings (*de Leg.*, II, 18, 16; *Orat.*, ch. 37) that the idea of a system of law based on the nature of man and applicable, so far as its utterances are intelligible, not more to one state than to another, was, throughout the last century of the republic, perfectly familiar in the phraseology of the people, if not yet in that of the lawyers. It is thus not true that the Roman lawyers of the times of the Antonines borrowed the conception of a law of nature for the first time directly from the Stoic philosophy, though it is possible that the popularity of the Stoic philosophy was favorable to the clear enunciation of the dictates of the law of nature by the most eminent jurists. It is certain, however, that in the time of Gaius the expression *jus gentium* and *jus naturale* were convertible. Savigny has collected a number of passages from Gaius' writings which quite suffice to show that in his mind there were two branches of the law, and two only, that is to say, the *jus civile* on the one hand, and the *jus gentium* or *jus naturale* on the other."

Moyle (*Imperatoris Justiniani Institutionum*, pp. 36, 37) holds that the Prætor did not deliberately cull from the laws of the different nations the rules common to them, but that, driven by necessity, they took the *jus gentium* piece by piece from foreign sources. He, therefore,

agrees with Maine in ascribing to it another than Roman origin. He agrees also with Maine in holding that, in the beginning, the *jus gentium* must have been held by the Roman in lower esteem than his own *jus civile*, but asserts that Maine errs in fixing the time at which it came into better repute at the period of the conquest of Greece and the importation of Stoic philosophy. "Greece became a Roman province in the middle of the second century B.C., but her philosophies were still regarded at Rome with dislike, and in B.C. 161 their teachers were expelled from the city. Stoicism was first raised to full influence in the higher ranks of Roman society by means of the group which gathered around Scipio Æmilianus, who died B.C. 129; and Quintus Scævola, consul B.C. 95, and the founder of scientific jurisprudence was one of its earliest disciples. We may believe that from the last mentioned date onward its doctrines were applied to the development of law with consistency and success; but it still remains to be proved that the Romans did not begin to regard the *jus gentium* with feelings other than of disdain until this period. The edict of the prætor peregrinus had been in existence and applied to citizens in their relations with foreigners, for more than a century; and we cannot believe, on the one hand, that the prætor urbanus could have witnessed the continuous growth of this liberal and reasonable system of law without having adopted portions of it in his own edict during the second century B.C.; while, on the other hand, it is impossible that this could have been done without the approval of the profession and of the nation. Stoicism, then, it would seem, cannot be credited with having been the original and entire cause of the change of feeling with which the Romans regarded the *jus gentium*."

CHAPTER XVIII

POLYBIUS

Polybius deserves a place rather among historians or historical philosophers than among political philosophers. At the same time, however, his *History of Rome* is frankly didactic in purpose ; and where he analyses and criticises those excellencies of Rome's governmental organisation which, according to his view, served largely to explain her wonderful success in extending in half a century her sovereignty over almost the whole habitable world, his work becomes so purely political in character as to justify a short description of it in this treatise.

In 167 B.C., the Greek Polybius was seized by the Romans and taken to their capital city and there kept seventeen years as an Achæan hostage. During these years he thus had abundant opportunity to gain the necessary information for his great work, which was to give an account of the growth of Rome from 220 B.C. — the point to which the histories of Aratus and Timæus had brought the narrative — to 146 B.C., the date of the destruction of Corinth. Of the forty books of this work, but five have come down to us in complete form. Of the remainder we have but fragments. The aim of the work, and the importance of the subject, he announces in his opening paragraph. "What man," he asks, "is there so sordid and insensible, that he would not wish to be informed what manner, and through what kind of government, almost the whole habitable world, in less than the course of fifty-three years, was reduced beneath the Roman yoke : an event of which there is no example in any former time."[1] And

[1] This and the following quotations are from the translation of James Hampton.

later on he says: "The chief intention of this history is to show, at what time, in what manner, and from what causes, the whole world became subject to the Roman power. . . .

"In the course of these events, we shall be able clearly to discern by what kind of conduct the Romans gradually enlarged the limits of their power, till they gained the sovereignty of the world. Now if the bare contemplation of good and ill success could of itself enable us to form a right judgment on the conduct either of States or private men, we should here close our history. . . . But the view only of the manner in which wars are terminated can never lead us into a complete and perfect knowledge, either of the conquerors, or the conquered nations. . . . On this account, it will be useful likewise to review the policy, which the Romans afterwards observed, in governing the countries that were thus subdued: and to consider also, what were the sentiments of the conquered states, with respect to the conduct of their masters: at the same time describing the various characters and inclinations of particular men, and laying open their tempers and designs, as well in private life, as in the affairs of government. From these inquiries, the people of the present times will be enabled to discern how far their interest requires them to continue still in their dependence on the Romans; and posterity may also fully understand the whole civil policy of this great republic, and pass a right judgment on its defects and excellencies. And from hence, indeed, will arise the chief advantages that are to be expected from this history, with regard both to the present and to future times."[1]

That part of the work of Polybius which most interests the historian of political ideas is the Sixth Book, in which the origin and natural revolution of civil society is considered, and an analysis made of the governmental institutions of Rome. To this book, then, we shall immediately turn.

[1] Bk. III, ch. I.

After calling attention to the fact that most writers of the past had distinguished three kinds of government — royalty, aristocracy, and democracy — he asks whether they are to be considered as speaking of these as the only kinds of government, or simply the best kinds; and answers the question by declaring that in either case they are in error, for not only is there another political type, which is composed of a mixture of the three types already mentioned, but, as both reason and experience show, this composite type is the best political form possible. Before proceeding, however, to set forth the specific excellencies of this best form, he stops to describe the simpler forms from which it borrows its own characteristics. Allied to the three simple governmental forms, there are, he declares, three corrupt forms. The title *royalty*, he asserts, is not properly applicable to every government that is governed by a single sovereign, but only to that one alone whose chief derives his authority from the consent of the governed, and exercises it according to right reason rather than by force and terror. Where the ruler has obtained his office and maintains his authority through any other means, tyranny and not royalty is the proper name. So, also, he denies the title *aristocracy* and applies the name *oligarchy* to those governments, the supreme direction of which is in the hands of a few, who are not appointed by free choice or distinguished by their integrity and prudence. Finally, he declares that that government is not to be esteemed a democracy in which the whole multitude "usurp the liberty of pursuing their own counsels and designs without control." "We only behold a democracy," he says, "when we see a people, who, from the ancient manners of the country, are accustomed to pay due worship to the gods, to revere their parents, to show respect to the aged, and to obey the laws; when, in the assemblies of citizens like these, the resolutions of the greater part are made the rule of government." The corrupt form of popular government Polybius terms simply "government by the multitude."

Continuing his account of these three forms and their corruptions, Polybius proceeds to show that they form something more than a mere formal series. The experience of states demonstrates, he asserts, that governmental forms stand in a definite historical sequence, one after the other. In the beginning comes simple monarchy, which is the spontaneous creation of Nature, the assumption of power by the one most conspicuous for strength and courage, just as among animals, ungifted with reason, the strongest leads the herd. Afterward, however, "when in these societies a common education and mutual intercourse have produced new sentiments and habits, then first commences royalty; then first arise in the human mind the notions of honourable and base, of just and unjust." From this last clause it is apparent that, though Polybius regards the primitive, monarchical régime as one of the stages of human development, he does not dignify its form of public control with the name *government;* for, as yet, the authority that is exercised and the obedience that is yielded are not based upon any definite notions of right or wrong, or upon any reasoned theory of political legitimacy. True government as distinguished from that sort of subordination of inferiors to superiors exhibited in the communal life of animals does not begin until the leader is deliberately and freely chosen by his subjects, who are consciously actuated by motives of self-interest and governed by notions of right and wrong.

The force leading men to recognise the propriety and value of civil society is described as that reason with which men are by Nature endowed. Gifted with this power they are able and are necessarily led to pass judgment upon different kinds of actions, and, correspondingly, to estimate the worth of those committing them. Furthermore they are able both to perceive ends that are desirable and adopt the means necessary for their attainment. And thus it comes about, says Polybius, that when a society of men see that their leader, who has originally become such

simply because of his strength and intelligence, uses his power with justice and for the promotion of the public good, they no longer dread his superior force but pay a willing obedience to his recognised wisdom and probity; and thus their monarch becomes their king, and government, in a true sense of the word, is established.

Once established, however, the necessary tendency of royalty, says our author, is to degenerate into tyranny, its corrupt form. This leads to conspiracies against the tyrant's rule, in which the more distinguished of the people take the lead; the existing government is overturned, and an aristocracy takes its place. In its turn, aristocracy develops its inherent vices, becomes an oligarchy, oppresses the people, who rise against their rulers and establish themselves in power. Again, for a period, the government is administered in the interest of the governed. But soon dissensions arise; the wealthy, seeking greater power, corrupt the weak and ignorant; injustice and violence and corresponding discontent increase, until finally some bold and enterprising leader arises who gains the multitude to his side, and secures for himself autocratic power. Thus the wheel swings full circle and the people find themselves again under that form of government with which they began their political life.

To this cycle of political changes Polybius ascribes an almost fatalistic certainty, — a certainty so great that, bearing in mind its order, the future development of a given state may be foretold by an inspection of its present condition.

"With the help of being acquainted with these principles," he says, "though it may not perhaps be easy to foretell the exact time of every alteration that may happen in a state, yet, if our sentiments are free from prejudice and passion, we shall very rarely be deceived in judging of the degree either of exaltation or decline, in which it actually subsists, or in declaring the form into which it must at last be changed." Even the Roman state itself, he thinks, can hardly escape from this closed circle of

changes. By establishing a government compounded of the better elements of the three simple forms, the tendency which each one of those pure types has to change into its corrupt prototype may be in a measure avoided; but though postponed, revolution can never be absolutely prevented. Lycurgus, by a skilful mixture of forms, was thus able to secure for Sparta a longer immunity from revolution than any other state had been able to enjoy, and what the Lacedæmonian state thus received at the very beginning through the foresight and reason of its founder, the Romans, says Polybius, have obtained piece by piece by adopting such improvements as, from time to time, actual exigencies have suggested to them, and thus, in fact, possess "the most beautiful frame of government of all that are in our times known." But in the end Rome, too, must submit to the inevitable sequence of changes.

Polybius then proceeds to show that the Roman state is so organised as to contain the elements of the three pure governmental forms combined in such perfect proportions that it is not easy even for the Romans themselves to determine certainly whether their government is to be esteemed a democracy, an aristocracy, or a monarchy. Into the details of this analysis, however, we need not enter.

Polybius's theories of the value of the mixed form of government, and of the natural tendency of the simple types to develop into their corrupt forms, cannot be said to have been original with him, as our examination of the writings of Plato and Aristotle have shown us. But, as Professor Dunning points out,[1] his is the first clear exposition of the fact that this excellence of the mixed form is derived from the system of constitutional checks and balances which it provides. "In the earlier philosophers the instability incident to the simple form was to be obviated by a blending of principles; in Polybius the same end was sought by a reciprocal antagonism of organs."

[1] *History of Political Theories*, Vol. I, p. 117.

CHAPTER XIX

CICERO

It has been said of Cicero that it is impossible to discover in his writings an original thought.[1] This is possibly true, and yet his name is an important one in the history of political ideas. Because of the admirable clearness and inspiring eloquence with which he expressed his views regarding the nature of the state and of law, and of the relation of both to the higher moral or natural code, the writings of the Roman orator, where known, have exerted an enormous influence. For these reasons, though we have already mentioned, in an incidental way, the part played by Cicero in introducing into Roman thought the Stoic conception of natural law, it is proper that his political writings be particularly described. This is a comparatively easy task from the fact that, because of the succinctness of his style, we shall be able, for the most part, to reproduce his thought in his own words.

By birth Cicero was a member of an Italian equestrian family. By profession he was an orator and advocate. In practical politics he belonged to the party of moderate optimates, as they were called, who, while not opponents of constitutional reform, were yet desirous of retaining the old republican form of government in which the effective power should be the Senate. The actual part played by Cicero in the troubled politics of his time has been often praised, and probably as often condemned. The truth, however, as near as we can get to it, would seem to be

[1] "Nobody that I know of has yet succeeded in discovering a new idea in the whole of Cicero's philosophical and semi-philosophical writings." Sir Frederick Pollock, *History of Politics.*

that, while eloquent as a speaker, able as a philosopher, and of unquestioned integrity, Cicero was not a statesman in the ordinary sense of the word. Though desiring a republic, he supported the Manilian law which gave to Pompey those very extraordinary powers which led to the overthrow of the oligarchy and paved the way for the monarchy. When repudiated by Pompey, instead of retiring from an active political life, which would have been the dignified thing to do, he made his famous speech *De provinciis consularibus*, which was in substance a panegyric on Cæsar, and attached himself to the Triumvirate. When, however, the final separation of Pompey and Cæsar came, Cicero, upon principle, followed the fortunes of Pompey when he must have seen that it would be to his greater personal advantage to side with the great Julius. After the death of Cæsar, Cicero praised his murderers, and in opposition to Antony again urged the reëstablishment of that republican form of government which, as an ideal, he never abandoned, and for the actual realisation of which he only temporarily ceased to strive, at the time that he gave his allegiance to the Triumvirs. For this opposition to Antony he practically paid with his life. He was killed in 44 B.C. at the instance of Lepidus, Antony, and Octavius.

Of Cicero's writings we need consider but three, — the *De Republica*, *De Legibus*, and *De Officiis*.

The "De Republica"

This work was for centuries lost to the world, and even now we have it but in the fragmentary form in which it was discovered in 1822 by Cardinal Mai, when librarian of the Vatican, in a palimpsest manuscript. Of the six books into which the treatise was originally divided, only the first three are fairly complete. Of the last three only the veriest fragments have been preserved. Fortunately, however, these latter books would probably not be of special

interest to the historian of political philosophy, being devoted, as we know, to the consideration of education and the theatre, together with some comments on the duties of magistrates.

The general aim of the *Republic* is somewhat the same as that of its Platonic prototype, namely, to determine the abstract ethical principles and to outline the governmental form of an ideal polity. In constructing this ideal Cicero has, of course, the needs of his own state in view, yet the argument is conducted throughout in pure philosophical terms, the Roman government being analysed and criticised only by way of illustration.

Cicero begins his work with an exhortation to his fellow-citizens to participate actively in public affairs. "Nor is it sufficient," he says, "to possess virtue as if it were some kind of art, unless we put it in practice. An art, indeed, though not exercised, may still be retained in knowledge; but virtue consists wholly in its proper use and action. Now the noblest use of virtue is the government of the commonwealth, and the carrying out in real action, not in words only, of all those identical theories which those philosophers discuss at every corner."[1]

"Our country did not beget and educate us with the expectation of receiving no support, as I may call it, from us; nor for the purpose of consulting nothing but our convenience, to supply us with a secure refuge for idleness and a tranquil spot for rest; but rather with a view of turning to her own advantage the nobler portion of our genius, heart and council; giving us back for our private service only what she can spare from the public interests. Those apologies, therefore, in which men take refuge as an excuse for their devoting themselves with more plausibility to mere inactivity, do certainly not deserve to be listened to."[2]

"Nor, indeed, is there anything in which human nature

[1] *Op. cit.*, Bk. I, ch. II. [2] *Idem*, Bk. I, ch. IV.

can more resemble the divine powers than in establishing new states, or in preserving those already established."[1]

A state (*res publica*) Cicero defines as "a constitution of the whole people (*constitutio populi*)." "But," he hastens to add, "the people is not every association of men, however congregated, but the association of the entire number, bound together by the compact of justice, and the communication of utility." "The first cause of this association," he continues, "is not so much the weakness of man, as a certain spirit of congregation which naturally belongs to him. For the human race is not a race of isolated individuals, wandering and solitary; but it is so constituted, that even in the affluence of all things [and without any need of reciprocal assistance, it spontaneously seeks society]."[2]

Regarding this definition of the state, several observations are to be made. In the first place, it is evident that Cicero definitely repudiates the Epicurean idea that the state has in itself no real right to be, but derives all its authority from a contract, directed by self-interest, and entered into severally by its citizens. As opposed to this, his idea is that of the Stoics, which sees in men a natural, rational need for society. A *societas*, according to Cicero, is bound together, *juris et utilitatis communione*, but this community of right is one of pure (natural) justice, not of formal conventional right, and this mutuality of interest is something that goes far deeper than the mere selfish interests of individuals.[3]

[1] *Op. cit., loc. cit.* [2] *Idem*, Bk. I, ch. XXV.

[3] This idea is still more explicitly stated in his *de Officiis*. "Neither is that maxim true," he there says, "which is affirmed by some, that human communities and societies are instituted from the necessities of condition because we cannot without the help of others supply what our nature requires; and that if we could be furnished, as by a kind of magic wand, with everything that relates to food and raiment, that then every man of excelling genius, laying aside all other occupations, would apply himself to knowledge and solitude. The fact is not so; for he would fly from solitude and look out for a community in his pursuits, and would desire sometimes to teach and sometimes to learn, sometimes to listen and sometimes to speak." Bk. I, ch. XLIV.

At the same time Cicero's theory of the state as a political organisation is something quite different from that of the Stoics. Here appears the Roman conception of the *civitas* as contrasted with the Hellenic idea of *polis*. The Greeks scarcely distinguished between a society and a state. To them a political government existed as an organ of both. On the other hand, in the thought of Cicero, and of the Romans generally, the *civitas* is not a *societas* simply, but a *res publica*. Furthermore, the Roman state is a *res populi*. It is the entire people politically organised and acting as a political unit. The government is therefore, directly or indirectly, necessarily democratic. Thus, even where there is no provision for the exercise of political powers by a popular assembly, the monarchic or aristocratic organs are construed as deriving their authority from, and exercising their powers in the interest of, the whole people.

In making this point Cicero apparently has in mind the distinction between the ultimate absolute sovereignty of the people as a political unit, and the proximate, limited, legal sovereignty of the government. The one is the source whence the government itself derives its right to be ; the other the source whence the formal validity of law is obtained. This distinction thus carries with it the separation in idea of the concepts "state" and "government." The state is necessarily democratic — a *res populi;* the government, in its immediate form, may or may not be so.[1]

Over every society, a public authority, exercising supreme coercive power is a necessity. "Every people, therefore," says Cicero, "which consists of such an association of the entire multitude as I have described, must be regulated by a certain authority, in order to be permanent. This intelligent authority should always refer itself to that grand first principle which established the commonwealth. It must be deposited in the hands of one supreme person, or intrusted to the administration of certain

[1] Cf. Rehm, *Geschichte der Staatsrechtswissenschaft*, § 37.

delegated rulers, or undertaken by the whole multitude. When the direction of all depends on one person, we call this individual a king, and this form of political constitution a kingdom. When it is in the power of privileged delegates, the state is said to be ruled by an aristocracy; and when the people are all in all, they call it a democracy, or popular constitution. And if the tie of social affection, which originally united men in political associations for the sake of public interests, maintains its force, each of these forms of government is, I will not say perfect, nor, in my opinion, essentially good, but tolerable, and such that one may accidentally be better than another: either a just and wise king, or a selection of the most eminent citizens, or even the populace itself (though this is the least commendable form) may, if there be no interference of crime and cupidity, form a constitution sufficiently secure."[1]

Cicero then goes on to show that, as he has above intimated, no one of these forms is essentially good; that is, each has its characteristic defect. For, he says: "In a monarchy, the other members of the state are often too much deprived of public council and jurisdiction; and under the rule of aristocracy, the multitude can hardly possess its due share of liberty, since it is allowed no share in the public deliberation, and no power. And when all things are carried on by a democracy, although it be just and moderate, yet its very equality is a culpable levelling, inasmuch as it allows no gradations of rank." Furthermore, Cicero continues, these three forms have not only the above-mentioned faults or defects, but have dangerous vices: "For there is not one of these three forms of government which has not a precipitous and slippery passage down to some proximate abuse." Monarchy inclines to tyranny, aristocracy to oligarchy, and democracy to disorder and license. Happily, however, there is, says Cicero, a fourth kind of government, which, by its composition, is

[1] *De Republica*, Bk. I, ch. XXVI.

saved from these defects and dangers: "It is that mixed and moderate government which is composed of the three particular forms which I have already noticed."

By combining the elements of the three simple forms, the mixed government, Cicero thinks, retains their excellences and at the same time avoids those perversions into which purer types are prone to fall. That is, the monarchical, aristocratic, and democratic elements mutually balance and check one another. If, however, it becomes necessary to choose one of the simple forms, Cicero prefers the royal one. "In this," he says, "which I here choose to call the primitive form of government, I find the title of father attached to that of king, to express that he watches over the citizens as over all his children, and endeavours rather to preserve them in freedom than reduce them to slavery."[1]

Next to monarchy, Cicero would seem to prefer aristocracy. Democracy, as a form of political order, he thus places last of all. Indeed he goes on to depict in the liveliest colours the defect of this mode of rule, and quotes Plato in substantiation of his opinion. Concluding this topic, he says: "Since these are the facts of experience, royalty is, in my opinion, very far preferable to the other kinds of political constitutions. But it is itself inferior to that which is composed of an equal mixture of the three best forms of government, united and modified by one another. I wish to establish in a commonwealth a royal and preëminent chief. Another portion of power should be deposited in the hands of the aristocracy, and certain things should be reserved to the judgment of the multitude. This constitution, in the first place, possesses that great equality without which men cannot long maintain their freedom; secondly, it offers a great ability, while the particular separate and isolated forms easily fall into their contraries: so that a king is succeeded by a despot, an aristocracy by a faction, a democracy by a mob and

[1] *De Republica*, Bk. I, ch. XXXV.

confusion; and all these forms are frequently sacrificed to new revolutions. In this united and mixed constitution, however, similar disaster cannot happen without the greatest vices in public men. For there can be little occasion for revolution in a state in which every person is firmly established in his appropriate rank, and there are but few modes of corruption into which one can fall."[1]

In the second book of the *Republic*, Cicero gives a brief review of the development of the Roman constitution, showing the causes of the disasters it had sustained at different crises of its history, and drawing lessons from them. This book, however valuable it may be to the student of Roman constitutional history and law, presents no political theories which we need to describe.

In his third book, Cicero examines the question of political justice and it is here that we find appearing that philosophic conception of a universal system of abstract right — *jus naturale* — which was to play so important a part in the development of Rome's jurisprudence. From beginning to end the book is, in effect, an argument in support of the position that moral principles are as applicable to political matters as they are to affairs of private concern.

The existence of inherently valid, and therefore universally applicable, principles of right, he eloquently maintains. This abstract, natural law, deriving its force from its essential rationality, is ethically superior to all conventional law. "True law," he says, "is right reason conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions, and the wicked treat them with indifference. This law cannot be contradicted by any

[1] Bk. I, ch. XLV. Of this first book Yonge says (Bohn's ed., p. 284), it is "a splendid epitome of the political science of the age of Cicero; and probably the most eloquent plea in favor of mixed monarchy to be found in all literature."

other law, and it is not liable either to derogation or abrogation. Neither the Senate nor the people can give us any dispensation for not obeying this universal law of justice. It needs no other expositor and interpreter than our own conscience. It is not one thing at Rome and another at Athens: one thing to-day, and another to-morrow: but in all times and nations this universal law must forever reign, eternal and imperishable. It is the sovereign master and emperor of all beings. God himself is its author, its promulgator, its enforcer. And he who does not obey it flies from himself and does violence to the very nature of man."[1]

The "De Legibus"

The *Laws* of Cicero we likewise possess in but fragmentary form. Of the five or six original books we have but three, and these are imperfect. In some cases the text itself is lost, in others the language is so unpolished as to indicate that in all probability the work was posthumously published. The treatise was evidently intended as a supplement to the *Republic.* In this, Cicero is avowedly influenced by the example of Plato. Thus the speaker, Atticus, says: "But if you ask what I expect, I should reply, that having given us a treatise on the commonwealth, it appears a natural consequence that you should also write one on laws. For this is what I see was done by your illustrious favourite Plato, the philosopher whom you admire and prefer to all others, and love with special affection."[2] At the same time the aim of this latter work is not, as was the aim of the *Laws* of Plato, to set forth a modified and more practical policy than had been urged in the earlier work. Cicero's aim rather is to continue the same argument that he had begun in the *Republic;* namely, to call back his fellow-citizens to a love of

[1] Bk. III, ch. XXII. These are probably not the exact words of Cicero, for we know of them only through the mouths of Augustine and Lactantius.

[2] *De Legibus*, Bk. I, ch. V.

their country and to political justice by showing that all civil law is, or should be, founded upon immutable decrees of natural justice. He therefore develops at even greater length than he had done in his earlier work, the nature and source of legal obligation.

"In no kind of discussion" [than in the one to be undertaken], he begins, "can it be more advantageously displayed how much has been bestowed upon man by nature, and how great a capacity, for the sake of cultivating and perfecting which we were born and sent into the world, and what beautiful association, what natural fellowship, binds men together by reciprocal charities; and when we have explained these grand and universal principles of morals, then the true fountain of laws and rights can be discovered." [1]

These grand and universal principles derive their nature from the rational nature of man and are discoverable by his reason. "This animal — prescient, sagacious, complex, acute, full of memory, reason, and council, which we call man," he says, "has been generated by the supreme God in a most transcendent condition. For he is the only creature among all the races and descriptions of animated beings who is endued with superior reason and thought, in which the rest are deficient. And what is there, I do not say in man alone, but in all heaven and earth, more divine than reason, which, when it becomes right and perfect, is justly termed wisdom?" [2]

"Law is the highest reason, inherent in nature, which commands those things which ought to be done and forbids the contrary." [3] "There is a reason issuing from

[1] *De Legibus*, Bk. I, ch. V.

[2] Bk. I, ch. VIII. Compare *de Officiis*, Bk. I, ch. IV. Nature, he there says, impels all living beings to seek self-preservation and comfort, and avoid evils. But animals act by instinct, only in the present — not in the past or future — while man acts by reason "by which he discerns consequences, looks into causes of things and their progress, and being acquainted, as it were, with precedents, compares their analogies and adapts and corrects the present with what is to come."

[3] *Idem*, Bk. I, ch. VI.

nature, impelling towards right and dissuading from wrong, which did not then first begin to be law when its dictates were expressed in writing, but when it first arose, and it arose at the same time as the divine mind. Wherefore the true and highest law, well fitted to command and forbid, is the right reason of the supreme divinity (*recta ratio summi Jovis*)."[1]

From these premises a cosmopolitanism similar to that taught by the Stoics necessarily follows. "There exists, therefore, since nothing is better than reason," he says, "and since this is the common property of God and man, a certain aboriginal intercourse between divine and human natures. But where reason is common, there right reason must also be common to the same parties; and since this right reason is what we call law, God and men must be considered as associated by law. Again, there must also be a communion of right where there is a communion of law. And those who have law and right thus in common, must be considered members of the same commonwealth. And if they are obedient to the same rule and the same authority, they are even much more so to this one celestial regency, this divine mind and omnipotent deity. So that the entire universe may be looked upon as forming one vast commonwealth of gods and men."[2]

A little later on, he says: "There is no one thing so like or so equal to another, as in every instance man is to man. And if the corruption of customs, and the variation of opinions, did not induce an imbecility of minds, and turn them aside from the course of nature, no one would more resemble himself than all men would resemble all men. Therefore, whatever definition we give to man, will be applicable to the whole human race."[3]

Because all men are thus related, they are subject to the same laws of right and justice. "Nature made us just that we might share our goods with each other, and sup-

[1] *De Legibus*, Bk. II, ch. IV. [2] *Idem*, Bk. I, ch. VII.
[3] *Idem*, Bk. I, ch. X.

ply each other's wants. . . . To those to whom nature has given reason, she has also given right reason, and therefore also law, which is nothing else than right reason enjoining what is good and forbidding what is evil. And if nature has given us law, she hath also given us right. But she has bestowed reason on all, therefore right has been bestowed on all." [1]

Coming now to the relation which exists between natural rules of right and the conventional principles of a nation's particular *jus civile*, Cicero says: "It is an absurd extravagance in some philosophers to assert that all things are necessarily just which are established by the civil laws and the institutions of nations. . . . There is but one essential justice which cements society, and one law which establishes this justice. This law is right reason, which is the true rule of all commandments and prohibitions. Whoever neglects this law, whether written or unwritten, is necessarily unjust and wicked. But if justice consists in submission to written laws and national customs, and if, as the same school affirms, everything must be measured by utility alone — he who thinks that such conduct will be advantageous to him will neglect the laws, and break them if it be in his power. And the consequence is that real justice has really no existence if it have not one by nature, and if that which is established as such on account of utility be overturned by some other utility." [2]

Guided by the principles which he has established in his first book Cicero attempts in the remainder of his work to outline a code of laws which shall suit his idea of a well-constructed and well-conducted state. As already said, of these remaining books but two have been preserved.

[1] *De Legibus*, Bk. I, ch. XII. Cf. *de Officiis*, Bk. III, ch. VI: "As the nature, so the interest of all mankind is a common one. If that be so, we are all included under one and the same law of nature. . . . They who say that a regard ought to be had to fellow-citizens, but deny that it ought to foreigners, break up the common society of the human race, which being withdrawn, beneficence, liberality, goodness, justice, are utterly abolished."

[2] *Idem*, Bk. I, ch. XV.

These deal in the main with laws regarding the proper worship of the gods and with the duties and powers of magistrates. As we learn from a prior statement, in these last books the particular rights and privileges of the citizens were defined.

This suggestive code, so far as we have it, is based very largely upon the Roman law and customs of Cicero's own time, the only alterations being such as seemed necessary to avoid special dangers, and to bring the general polity of the state into accord with that republican-aristocratic form of government which Cicero so highly esteemed.

The "De Officiis"

Of Cicero's ethico-political works, his *Offices* is the least original and the least important. As is well known, the first two of the three books of this treatise are closely based upon a lost work of the Greek philosopher Panætius, who lived at Rome in the second century B.C. In form the work is a letter to the author's son Marcus, instructing him in his duties as a man and a citizen. The ethical obligations that flow from the Stoic idea of a natural law are repeated, though greater emphasis is laid upon the social duties thus created than was generally laid by the followers of Zeno. "One thing," Cicero says, "ought to be aimed at by all men; that the interest of each individually, and of all collectively, should be the same; for if each should grasp at his individual interest, all human society would be dissolved." [1]

Referring to the general duty of those in power to rule in the interest of the whole people, Cicero brings out very clearly the democratic basis upon which he conceives all political authority to rest. "All who hope to rise in a state," he says, "ought strictly to observe the two rules of Plato. The first is, that they so keep in view the sovereignty of their fellow-citizens as to have reference to it in

[1] *De Officiis*, Bk. III, ch. IV.

whatever they do, regardless of their individual interest. The second is, that their cares be applied to the whole of the state, lest while they are cherishing one part they abandon the others. For the administration of government, like a guardianship, ought to be directed to the good of those who confer, and not of those who receive the trust."[1]

Again he says: "It is the peculiar duty of a magistrate to bear in mind that he represents the state, and that he ought, therefore, to maintain its dignity and glory, to preserve its constitution, to act by its laws, and to remember that these things are committed to his fidelity."[2]

It has been a much disputed point as to whether Cicero definitely upholds the right of tyrannicide. His most explicit utterance upon that point is the following: "What can be greater wickedness," he asks, "than to slay not only a man, but even an intimate friend? Has he then involved himself in guilt who slays a tyrant however intimate? He does not so appear to the Roman people at least, who of all great exploits deem that the most honorable. Has expediency, then, overcome virtue? Nay, rather, expediency has followed virtue."[3] From this passage it would appear, that, even if he did not directly counsel tyrannicide, Cicero found it unnecessary to repudiate the good opinion held by his countrymen of the act. Certain it is that this passage continually served in later times as an argument in support of this means of gaining riddance of an oppressor.

As regards the estimation in which he held all industrial and commercial activities, Cicero did not rise above the general view of his age. Agriculture and intellectual professions he praises, but all else he declares mean and degrading. Tax-gatherers and usurers, and all those whose trades serve the purposes of sensuality he especially condemns. But even of mechanical toil generally and of retail

[1] *De Officiis*, Bk. I, ch. XXV. [2] *Idem*, Bk. I, ch. XXXIV.
[3] *Idem*, Bk. III, ch. IV.

trading he says: "We are likewise to account as ungenteel and mean the gains of all hired workmen, whose source of profit is not their art but their labor; for their very wages are the consideration of their servitude. We are likewise to despise all who retail from merchants goods for prompt sale, for they never succeed unless they lie most abominably. Now nothing is more disgraceful than insincerity. All mechanical laborers are by their profession mean. For a workman can obtain nothing befitting a gentleman."[1]

Conclusion

Summing up the value of political philosophy of the writings of Cicero one is forced to confess that the largest element consists rather in the part played by them in the transmission of Greek ideas to Roman thought, than in the creation of distinctly new theories. At the same time, in this process of transmission, these ideas take on a new guise and assume a changed significance. The Greek *polis* becomes the Roman *civitas* or *res republica:* the Stoic cosmopolitanism becomes, in the inquiring Latin's thought, the theory of an actual political world-empire. As Windelband expresses it: "Cosmopolitanism, which had arisen among the Greeks as a distinct ideal in the downfall of their own political importance, becomes with the Romans the proud self-consciousness of their historical mission."[2]

The actual political influence exerted by Cicero's writings upon the political practice of his time was probably very little. Writing at a time when politics and morals were fast declining, when patriotism was on the ebb and the spirit of faction rife, the voice of Cicero calling back his fellow-citizens to a love of republican liberty, to a loyalty to law, and to a belief in the eternal validity of the rules of justice which the reason dictates, was little better

[1] *De Officiis*, Bk. I, ch. XLIII.
[2] *History of Philosophy*, Eng. transl., p. 177.

than a voice crying in a wilderness. The ultimate influence of Cicero's teachings, however, was great beyond estimate. The idea that "man is born for justice, and that law and equity have not been established by opinion but by nature,"[1] once clearly stated by Cicero and supported by all his matchless eloquence sank ever deeper into the legal thought of Rome, and this idea it was, as we have already learned, that was largely instrumental in bringing about that marvellous growth of the Roman law which found a culmination in the Justinian Code.

[1] *De Legibus*, Bk I, ch. X.

INDEX

Abbott, *Life and Literature of the Hebrews*, cited, 23 n.; quoted, 25.
Amos, *Roman Civil Law*, cited, 238; quoted, 266.
Aristotle, *Nicomachean Ethics*, quoted, 142, 147; cited, 62, 67; *Constitution of Athens*, cited, 66 n., 150 n.; *Politics* criticised and analysed, 137 ff.; *Rhetoric*, quoted, 143, 144; aim of the state, 157 ff.; classification of governments, 168 ff.; citizenship, 166; economic views of, 181 ff.; ethics, relation of, to politics, 146; ideal polity, 175 ff.; natural law, 140 ff.; Plato criticised, 113, 163 ff., 166 n.; slavery, 155 ff.; state, its right to be, 152 ff.; 208 f.
Assyrians, political theories of, 17, 21.
Austin, *Jurisprudence*, cited, 237, 239 n.

Babylonians, political theories of, 17, 21.
Bonar, *Philosophy and Political Economy*, quoted, 182.
Borgeaud, *Histoire du Plebiscite*, cited, 243 n.
Bosanquet, *The Philosophical Theory of the State*, quoted, 206.
Bury, *History of Greece*, quoted, 74; cited, 89 n.

Caird, *Hegel*, cited, 210.
Cicero, political theories of, 274 ff.
Clan, 6 ff.
Clark, *Practical Jurisprudence*, quoted, 40, 42, 220 n., 259.
Classification of governments. See Governments.
Constitutional Law, Greek conception of, 62 f.
Cope, *Introduction to Aristotle's Rhetoric*, cited, 146, 169 n.
Covenant, Book of the, 29.
Custom, in Roman law, 223, 226 f., 245.
Cynics, political theories of, 89.

Dahn, article "Philosophy of Law," quoted, 61 n., 82.
Davidson, *Aristotle and Ancient Educational Ideals*, quoted, 82 n., 107, 114 n., 189; cited, 91, 185 n.
Democracy, of the Greeks, 65 ff.
Deuteronomic Code, 29 f.
Dike, 41 ff.
Draco, code of, 46.
Dunning, *Politics of Aristotle*, quoted, 174 n.; *History of Political Theories*, quoted, 273.

Egyptians, political theories of, 18 f.
Encyclopædia Biblica, cited, 23 n.
Epicureans, political theories of, 191 ff.
Equality, Greek theories of, 200 ff.

Family, not the primitive political unit, 5 ff.
Fanta, *Der Staat in der Ilias und Odyssee*, cited, 41 n.
Fas, 221 f.

Fiske, *Unseen World and Other Essays*, quoted, 34.
French, *Concept of Law in Ethics*, quoted, 203.

Governments, classifications of, Aristotle, 170 ff.; Herodotus, 59; Plato, 109, 110 n., 126; Polybius, 270 ff.; Thucydides, 169.
Greenidge, *Handbook of Greek Constitutional History*, quoted, 58 n., 63, 171 n.; cited 41 n., 45 n.
Grote, *History of Greece*, quoted, 38 n.; *Plato*, quoted, 105, 111, 113, 135.

Hearn, *Aryan Household*, quoted, 10.
Hebrews. See Jews.
Hegel, *Philosophy of History*, quoted, 14, 32, 208, 217; *Philosophy of Right*, quoted, 210; *History of Philosophy*, cited, 112 n.
Hermann, *Ueber Gesetz, Gesetzgebung u. gesetzgebende Gewalt im griechischen Alterthume*, quoted, 48 n., 49 n.; cited, 51 n., 65 n.
Herodotus, *History*, quoted, 44; cited, 59; classification of governments, 169.
Hildenbrand, *Geschichte und System der Rechts- und Staats-philosophie*, quoted, 78.
Holm, *History of Greece*, cited, 65 n., 73.

Ihering, *Geist des römischen Rechts*, quoted, 242.
Immortality, Greek ideas concerning, 56 f.

Janet, *Histoire de la Science Politique*, cited, 16, 23 n., 80 n., 127, 188 n.; article *Political Science*, quoted, 128.
Jenks, *History of Politics*, cited, 8 n.
Jews, political theories of, 11, 23 ff.
Jurisconsults, 249 ff.
Jus, 222 f.
Jus Gentium, 246 ff.
Jus Naturale, 249 ff.; per Cicero, 281 ff.

Kant, *Philosophy of Law*, quoted, 205.
Kent, *Messages of Israel's Lawgivers*, cited, 23 n.

Law, development of Jewish, 27 ff.; idea of, in Greek thought, 36 ff., 64.
Law of Nature, stoic definition of, 195 f. See *Jus Naturale*.
Lee, *Historical Jurisprudence*, cited, 47 n.
Leist, *Graeco-Italische Rechtsgeschichte*, quoted, 47 n.
Lex, 225 ff.
Lex Cornelia, 248.
Lex de Imperio, 231, 238.
Lycurgus, code of, 44 f.

Maine, *Ancient Law*, quoted, 225, 246, 252, 253, 263 n.; cited, 40 n., 41 n.; *Early History of Institutions*, cited, 201; quoted, 221; patriarchal theory of, 4.
May, *Democracy in Europe*, cited, 16 n.
McCurdy, *History, Prophecy, and the Monuments*, quoted, 23; cited, 18, 23 n.
Mill, *Dissertations and Discussions*, quoted, 127.
Mommsen, *History of Rome*, quoted, 232, 235.
Morgan, *Ancient Society*, cited, 6.
Moses, political significance of work of, 26.
Moyle, *Imperatoris Justiniani Institutionum*, cited, 224 n., 225 n., 238; quoted, 266.
Muirhead, *Private Law of Rome*, quoted, 220 n., 222, 223 n., 224 n., 262 n., 264.

Natural Law, Aristotle's doctrine of, 140 ff.; stoic, 195 f.
Nature, Greek conception of, 32 ff., 53 ff., 141.
Nettleship, *Contributions to Latin Lexicography*, quoted, 264; *Philosophical Lectures and Remains*, quoted, 112 n.; cited, 77 n., 104 n., 115.
Newman, *Politics of Aristotle*, quoted, 139, 173 n.; cited, 58, 149 n., 156.
Nomos, 42 ff.

Patriarchal Theory, criticised, 5 ff.
Plato, doctrine of ideas of, 90; his *Republic* analysed and criticised, 94 ff.; criticised by Aristotle, 113, 138; his *Laws* analysed and criticised, 119 ff.; his *Statesman*, ditto, 125 ff.; his utopianism and idealism distinguished, 128 ff.
Plebiscitum, 234 ff.
Plutarch, quoted, 45.
Politicus, Plato's, 125 ff.
Pollock, *History of the Science of Politics*, quoted, 88, 274 n.; *Essays in Jurisprudence and Ethics*, quoted, 203; cited, 192 n.
Polybius, political theories of, 268 ff.
Popular Sovereignty, in Roman law, 231 ff.
Prætor's Edict, 247 ff.
Psephismata, 48, 52 n.
Pulszky, *Theory of Law and Civil Society*, quoted, 39 n.

Rawlinson, *Manual of Ancient History*, quoted, 18.
Rehm, *Geschichte der Staatsrechtswissenschaft*, quoted, 68 n.; cited, 278 n.
Religion, the basis of primitive political societies, 1, 17; of the Greeks, 31 ff.
Ritchie, *Natural Rights*, quoted, 79 n., 196; *Plato*, cited, 75 n.; quoted, 117.

Schömann, *Antiquities of Greece*, quoted, 45 n.; cited, 89 n.
Shorey, *The Idea of Good in Plato's Republic*, quoted, 108 n.
Skene, *Celtic Scotland*, cited, 8 n.
Sidgwick, *The Elements of Politics*, cited, 174 n.
Slavery, Aristotle's justification of, 154 ff.
Smith, Munro, quoted, 265.
Social Compact, theory of, in Roman law, 241 ff.
Socrates, political theories of, 81 ff.
Sohm, *Institutes of Roman Law*, quoted, 225 n., 265.
Solon, code of, 46 f.
Sophists, political theories of, 68 ff.
Sovereignty, in Roman law, 231 ff.
Spencer, patriarchal theory of, 4.
State, Roman definition of, 241 f.; historical origin of, 1 ff.; Greek justification of, 54 ff.
State of Nature, in Roman law, 263.
Stoics, political theories of, 191 ff., 202 ff.; influence of doctrines of, on Roman law, 251 f.
Süsemihl and Hicks, *Politics of Aristotle*, quoted, 166 n.; cited, 149 n.

Taylor, *Constitutional and Political History of Rome*, quoted, 219, 228, 240.
Themis, 27, 39 ff.
Tribe, 7 ff.
Twelve Tables, 225 ff.

Weber, *History of Philosophy*, cited, 80 n.; quoted, 100.
Wheeler, *Life of Alexander the Great*, quoted, 35.
Whibley, *Greek Oligarchies*, cited, 168 n., 171 n.

Willoughby, *Social Justice*, cited, 207; *The Nature of the State*, cited, 243 n., 244 n.
Windelband, *History of Philosophy*, quoted, 79 n., 193, 195.

Xenophon, Cyropædia analysed and criticised, 131 ff.

Zeller, *Pre-Socratic Philosophy*, cited, 31 n.; quoted, 71; *Socrates and the Socratic Schools*, quoted, 86; *Plato and the Older Academy*, cited, 112 n.; *Aristotle and the Earlier Peripatetics*, cited, 149 n.; quoted, 161, 185.

JA 8
.W5

KANSAS SCHOOL OF RELIGION
UNIVERSITY OF KANSAS
1300 OREAD AVENUE
LAWRENCE, KANSAS 66044